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United States

OCTOBER TERM, 1971

No. 70-92

(Previously October Term, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

MICHAEL N. KHOURIE,
425 California Street,
San Francisco, California 94104,
Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,
MICHAEL N. KHOURIE,
425 California Street,
San Francisco, California 94104,
Of Counsel for Respondents.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The respondents adopt the petitioners' statement.[1]

QUESTIONS PRESENTED

1. Is the concerted and deliberate use of judicial and administrative adjudicative processes, as the method of

[1]The respondents will follow the system of reference to appendices employed by petitioners. The appendix agreed to by the parties and printed in a separate pamphlet is referred to as "Jt. App." The appendix at the end of this brief is referred to as "Attached Appendix."

implementing a scheme to restrain trade, as alleged in the First Amended Complaint and set forth below under "Contents of First Amended Complaint" (pp. 4-8) exempt from the Sherman Act by the *Noerr-Pennington*[2] doctrine, as a matter of law on a motion under FRCP, Rule 12(b) (6)?

2. If the *Noerr-Pennington* rule extends to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, is relief under the Sherman Act barred, as a matter of law on a motion under FRCP, Rule 12 (b) (6), where the real purpose and actual effect of defendants' joint activities was to restrain competitors directly by deterring the filing and prosecution of applications rather than by genuine efforts to induce governmental action detrimental to competitors, as set forth below under "Contents of First Amended Complaint"?

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The appendix attached at the end of this brief contains the relevant provisions, in addition to those set forth in the appendix to Brief for Petitioners, of (1) the United States Constitution, (2) the Sherman Act, (3) the Interstate Commerce Act, (4) the Administrative Procedure Act, (5) the General Rules of Practice of the Interstate Commerce Commission, (6) the Urgent Deficiencies Act, (7) the California Constitution, (8) the California Public Utilities Code and (9) the Rules of Practice and Procedure of the California Public Utilities Commission.

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[2] *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

STATEMENT

1. Introduction

This case is before this Court because the district court, by Memorandum of Decision dated October 5, 1967 (Jt. App. 22-43), granted the petitioners' (hereafter "defendants") motion to dismiss under Rule 12(b) (6), FRCP. Defendants also filed a motion to dismiss for lack of jurisdiction, asserting that the present action was within the exclusive or primary jurisdiction of the Interstate Commerce Commission (ICC) or the California Public Utilities Commission (PUC). This jurisdictional motion was not argued before nor considered by District Court Judge Sweigert as shown by his letter of October 25, 1967. (Jt. App. 44-45).

Therefore, all questions of exclusive or primary jurisdiction, exhaustion of administrative remedies, express exemption or implied immunity from the antitrust laws have not been briefed, argued nor decided and are not presently before this Court. The sole question considered and ruled upon by the two courts below is whether the *Noerr-Pennington* doctrine precludes, as a matter of law, the application of the antitrust laws to the facts alleged in the First Amended Complaint.[3]

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[3]The defendants in their brief attempt to bring into issue or into evidence matters outside the pleading and outside the scope of the 12(b)(6) FRCP motion to dismiss. Whether the agencies or courts were prevented from exercising control over petitioners is not the question here in issue. The only question before the court is the reach of the *Noerr-Pennington* doctrine to the activities set forth in the complaint and not whether the involved forums, having some potential to control, had exclusive jurisdiction, thus excluding Sherman Act operation. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

A host of other cases decided by the Court are clear in their holding that no industry, regardless of regulation, enjoys a blanket

2. The Contents of the First Amended Complaint

The First Amended Complaint alleges that the petitioners (hereinafter defendants), the 19 largest highway common carriers in California and the West, and respondents (hereinafter plaintiffs), 15 highway common carriers, were engaged in the business of transporting goods throughout California, pursuant to certificates of public convenience and necessity granted by the PUC and the ICC.

For many years prior to 1961, and continuing uninterruptedly to the date of filing of this action, the PUC announced and maintained a liberal policy with respect to the granting of applications for certificates of public convenience and necessity and the transfer thereof, thus implementing its announced policy of encouraging competition among carriers large and small. Certificate rights were granted as a matter of course with no opposition in almost all cases because of the clarity with which the PUC had stated its liberal policy. However, procedures for protests, hearings, rehearings and appeals were unchanged

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exemption from the antitrust laws. *U.S. v. Philadelphia National Bank*, 371 U.S. 296 (1963); *U.S. v. Pacific & A.R. & N. Co.*, 228 U.S. 87 (1913); *U.S. v. Radio Corporation of America*, 358 U.S. 344 (1959); *U.S. v. Borden Co.*, 308 U.S. 188 (1939); *U.S. v. Federal Power Commission*, 369 U.S. 482 (1959).

Petitioners' lawful standing to appear in such proceedings is not authorization to violate the antitrust laws nor does such standing exempt or immunize them from those laws. Furthermore, respondents are not required by the regulatory statutes involved or by the requirements of the Sherman Act to seek whatever relief might be available through agencies before filing a treble damage action. *Carnation Co. v. Pacific Westbound Conference, supra,* at 222. Nor do the restrictions of the Sherman Act to a common carrier depend upon whether false information is given. Sherman Act violations based upon concerted employment of adjudicatory processes or the "sham" exception to the *Noerr-Pennington* doctrine do not require false information as a predicate for liability.

and available. Prior to 1963, any certificate granted by the PUC could be registered automatically with the ICC. Registration of certificates conferred the right to engage in interstate operations under the same terms and conditions as specified for intrastate rights granted by the PUC, without an independent hearing on the issue of interstate public convenience and necessity, until 1963, when applications, protests and hearings were made available in registrations and hence came under defendants' plan.

The complaint alleges that the defendants, in order to frustrate this policy and combat the competitive effects thereof, entered into an agreement in February 1961, to protest *all* applications for common carrier certificates and transfers then pending before the PUC and the ICC,[4] and all applications thereafter filed before these commissions. It was agreed in February 1961, that all applications were to be opposed, with or without consideration of probable cause and regardless of the merits of the appli tion or the protest. The practice has persisted from that date to the date of filing and beyond.

Defendants agreed first to make known and publicize to the industry—not the agencies or courts, or the electorate or shippers—in crystal clear terms that any and all applications, irrespective of merit or any other factor, would be met with a formal protest by defendants as a group. They publicized the identity of the members of defendants' group in order to make unmistakably clear their

[4]Appellants are informed that of approximately 60 applications pending in February 1961, 53 protests were filed. Of the 7 remaining, 5 involved local drayage area rights and 1 REA application. One common carrier application was not protested.

financial ability to carry out their proclaimed aims. They agreed that the deterrent effect would be greatest if all competing truckers knew with certainty that each protest would be pursued to the last and highest forum available and that every intermediate procedure would be exhausted if defendants lost their protests at the level below. It was made known to all truckers that any application filed by anyone would involve prohibitive expense and long delay. The plan included the feature and competitors were to be and were in fact informed that each of the 19 defendants was committed by binding agreement to the others to contribute, in amounts proportionate to each defendant's annual income, to a litigation trust fund to finance the program of protests whether or not the individual defendant had a direct competitive interest in any given protest. Even if the application were ultimately granted, this could only occur after prohibitive delay. Defendants' combination had as its basic intention the destruction and weakening of competition. The primary purpose of the conspiracy was to discourage, preclude and deter the filing of applications or, once applications had been filed, to discourage, preclude and delay their prosecution. The restraint upon competition was intended to have its principal effect prior to filing for rights or hearing and not at the time the commission involved decided the merits of the application. Defendants thus have supervened the liberal policy and have substituted their own, one of noncompetition, by the means pleaded.

The complaint does not allege that once a protest was filed the defendants failed to make a determined effort to present the best case possible under the circumstances in

support of the protest. Defendants' plan, as alleged, took into account that in order to give credibility to the plan, to remind potential applicants of its constant vitality and to discipline those who failed to get the message, full, competent and determined efforts had to be made at hearings. What the complaint does allege is that the agency decision in any given proceeding was highly immaterial. Defendants were acting to close the door to operating rights for other carriers, to protest—not necessarily to win—although to win was desirable—in order to set an example, to discipline competitors, to intimidate them, to implement defendants' own "non-liberal" policy and to create a monopoly in themselves. Defendants' combination was not formed for the purpose of inducing governmental action but to obviate it.

The complaint further alleges that the objectives of the defendants' conspiracy were fully realized. The threat of inexorable opposition, the dissemination of the fact of their resolve to protest coupled with the actual prosecution of protests caused the certification process to degenerate from a level where many applications were filed and virtually all were granted to a point where practically none were filed. The impact of defendants' conspiracy was so pervasive that it subverted the machinery and function of the PUC, the ICC and of the courts to defendants' own illegal purposes which, as clearly pleaded, were to destroy or lessen competition by the means agreed upon by them. The effective result was that the commissions and the courts were supplanted by the conspiracy which became the regulator of certificates of public convenience and necessity.

The complaint alleges that the plan was successful not because of any change in the liberal policy of the PUC nor because of defendants' success on the merits in various proceedings but rather due to abstentions from filing of applications, settlements and voluntary dismissals. It was direct intimidation, not governmental action, which restrained competition in this case. (Jt. App., p. 4-12.)

3. The Regulatory Context of This Case

(a) Essential Role of Certificates of Public Convenience and Necessity, Their Registration and Transfer

This case involves common carriers. A trucker cannot become a common carrier without a certificate of public convenience and necessity, and a common carrier cannot expand its territory without such a certificate authorizing extension. A common carrier cannot move its trucks without such specific authorization. A certificate of public convenience and necessity is a grant of a partial monopoly by the state to a business enterprise authorizing it to conduct business as described therein. (California Public Utilities Code §§1005, 1061, 1062, 1063, 1064 and 1069.) The focus of this case is on the proceedings involved as a condition precedent to entry into or expansion of a business, because, in the relevant service market, obtaining a certificate is the first and indispensible step to entry or expansion of business.

It is well known that business expansion in California and the West has been unprecedented. The role of the highway common carrier has been crucial to this expansion. New industries and established Eastern companies have entered the Western markets. Transportation of goods and packages between populous centers and more

remote areas has increased tremendously as such remote areas became more urbanized. To respond to these changing patterns of demand, access to the source of rights to operate trucks on regular routes between fixed points was and is fundamental. These rights are essential to the conduct of business. They are, in economic effect, one and the same. Rights, once acquired, may be registered with the ICC, entitling the registrant to use the intrastate routes as part of their interstate operation. 49 U.S.C. §306(a)(7. Registration with the ICC normally eliminates a double hearing and is authorized by federal statute.

Registration, like the certificate to be registered, is an important and valuable business right for the same reasons the certificate is valuable. Certificates are valuable not only because they can be the basis for a common carrier seeking to earn a profit, but also because they can be bought and sold, like any other asset. Because of expanding business and industry in the West and the great role common carriers have had in this expansion, a certificate which cannot be extended as markets expand is of much less value than one which readily can be. Furthermore, if it is known by a carrier that it will be exceedingly difficult to transfer a certificate, he is, by that reason alone, effectively deterred from seeking a certificate or extension of it in the first instance.

(b) The PUC, ICC and the Courts are the Exclusive Agencies Through Which Certificates, Their Registration and Transfer Can Be Secured

Motor carriers have no sources other than the PUC and ICC from which to obtain business rights. If carriers do not have full and free access to such agencies, these valu-

able rights will not be available to them even though they otherwise qualify according to regulatory standards.

(c) Only the Adjudicatory Function of the PUC and ICC Is Involved In This Case

Common carrier rights are acquired only by the filing of a formal verified application and a finding of public convenience and necessity. The proceedings are similar to court proceedings in the sense that they are adversary in nature. In courts as well as in agencies, some proceedings are unopposed. However, in all cases in which opposition occurs, the proceedings are adversary proceedings and the isues presented are adjudicated.

Plaintiff's attack is directed solely at defendants' uses of the adjudicative processes of the courts, the PUC and the ICC. The adjudicatory function of the PUC is initiated by the filing of a formal verified application (California Public Utilities Code §1069) upon which a hearing is held. (Rules of Practice (ICC) Rule 247 [49 CFR §1100.247], California Public Utilities Code §1005.) Such hearings are judicial in nature. They are characterized by the use of process, formal notices as specified by statute, discovery (including the taking of depositions), use of subpoenas and subpoenas duces tecum identical to the procedures employed by the Superior Courts in California, the taking of testimony under oath, findings of fact, conclusions of law, decisions and opinions, use of precedent in the decisional process, the making of a record and the prohibition against informal approaches to the hearing officers or commissioners concerning a case while it is under consideration. Appellate review of Commission decisions is available. (See statutes and rules set forth in

attached appendix.) The agencies involved here have many functions other than the one characterized above as judicial. Plaintiffs desire to make it clear, and believe it is clear from the First Amended Complaint, that no functions of the agencies other than the adjudicatory processes described are involved in this case. (Jt. App. 3-4.)

4. Reasoning of Decisions Below

(a) Federal District Court, Per Judge Sweigert

In granting defendants' motion to dismiss, Judge Sweigert construed the *Noerr* and *Pennington* decisions of this Court *(Eastern Railroad Presidents Conference v. Noerr, supra; United Mine Workers v. Pennington, supra,* to hold that no violation of the Sherman Act could be predicated upon combined approaches before "governmental officials" (including judges and administrative adjudicators) even when the sole purpose and intent of the persons engaging in such activity is to restrain trade and destroy competition. While Judge Sweigert recognized that *Noerr* and *Pennington* dealt only with the "legislative" and "executive" branches of the government, he concluded that since the right of access to courts and administrative adjudicatory agencies "is just as much a political right as the right of access to the legislative and executive branches" (Jt. App. 34), the rationale of *Noerr* and *Pennington* was equally applicable.

Further, Judge Sweigert held that the activities of defendants did not fall within the "sham" exception of the *Noerr* case because plaintiffs could not allege that all of the applications filed were meritorious nor that all of the protests filed were groundless. Because the defendants

influenced rulings on the merits in some of the application proceedings, their activities were deemed to be "genuine" efforts to influence government. The allegations regarding the deterrent effect of raising the burdens of application to prohibitive levels were dismissed as describing nothing more than an incidental effect of litigation and of no independent significance.

(b) Dissenting Circuit Judge Hamlin

Judge Hamlin adopted the reasoning of Judge Sweigert, felt that the certification procedure is one "akin to policy-making" (Jt. App. 60), and that any abuses of these procedures should be within the exclusive jurisdiction of the respective commissions. As noted above, this latter ground is not before this Court. Only the motion to dismiss based upon *Noerr* and *Pennington* has been decided by the District Court (Jt. App. 44-45), and the power of the commissions to regulate participation in their proceedings is irrelevant to this issue.

(c) The Ninth Circuit Court of Appeals

The Court of Appeals, per Circuit Judge Browning and District Judge Pregerson, sitting by designation, reversed the District Court on two grounds. First, the *Noerr-Pennington* doctrine does not immunize agreements to use judicial and administrative adjudicative processes in a scheme to restrain trade. Second, even if this were not true, the complaint sufficiently alleges that defendants' activities were "mere sham," designed to restrain competition directly by the joint efforts of the defendants rather than indirectly by inducing restrictive governmental action. (Jt. App. 47-48.)

The Court pointed out that the *Noerr-Pennington* doctrine was a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the broad proscriptions of the Sherman Act. This exception was designed to protect the channels of political communication fundamental to the maintenance of a representative democracy and should be limited to joint approaches before governmental officials and bodies which act in a representative capacity. Since officials in the legislative and executive branches of government have the power to take action which operates to restrain trade, mere solicitation that such action be taken should not be proscribed regardless of purpose or intent.

The judicial branch and agencies acting as adjudicators, on the other hand, are not vested with the power to determine whether laws restraining trade will be enacted or, once enacted whether they will be enforced. Nor do such bodies act in a representative capacity. Their function is judicial, i.e., the application of standards of greater or less generality to concrete cases. The Court held licensing procedures to be adjudicative. (Jt. App. 50.) For these reasons the process of decision making, the materials which may be relied upon, and the atmsophere consistent with the effective performance of their respective functions are markedly different from those which obtain before the legislative and executive branches of government.

The court noted that the patent-antitrust cases, typified by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); and *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), support three conclusions. First, that defendants' abuse of judicial

and administrative adjudicative processes is not "essentially dissimilar," in the *Noerr* sense, from conduct traditionally condemned by the Sherman Act. Second, that while purpose and intent may be immaterial where the target of concerted approaches is legislative or executive, unlawful or wrongful intent or purpose is of determinative importance when the joint approaches are made before judicial or administrative adjudicative agencies. Third, the Court also noted that agreements to use litigation as a means of restraining trade, as opposed to redeeming civil rights, are not essentially dissimilar from conduct traditionally condemned by the Sherman Act and that such agreements were not immunized by either the *Noerr-Pennington* or *Button*[5] rules. (Jt. App. 51-52.) The Court pointed out that the subject matter of litigation was irrelevant where processes of adjudicating forums were being used for unlawful purposes, either alone or in conjunction with other means. (Jt. App. 53.)

With respect to the "sham" exception to the *Noerr-Pennington* doctrine, the Court held that "regardless of the status of joint approaches to adjudicative bodies," the complaint adequately alleges a conspiracy to impose a direct restraint under the guise of a program to induce governmental action rather than a genuine effort to induce such action. (Jt. App. 54.) Indicative of this intent to impose direct restraints were the decision to protest all common carrier applications for certificates, the communication of the existence, purpose, and jointly financed trust fund of the program of indiscriminate protests to competitors but not to the PUC, ICC or the courts, informing

[5] *NAACP v. Button*, 371 U.S. 415 (1963).

competitors that each and every application would be opposed with or without probable cause and regardless of its merits, resulting in burdens for the applicant far outweighing the potential benefits of the certificate if ultimately granted. When any competitor applied for certificates, the defendants carried out their threats and thereby effectively deterred the filing of subsequent applications. The Court stated that the "purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it." (Jt. App. 54, 58.)

Since every application was to be opposed, the Court held that it is irrelevant that a valid basis existed for opposing some applications. Nor was it significant that defendants made their opposition as effective as possible —mere token protests would not produce the desired effect. That defendants' activity would influence rulings of the agencies was inevitable, given the means employed, injury from resulting state action was merely incidental to the realization of the objective of deterring the filing of applications. Therefore, defendants' activities were "mere sham" unprotected by *Noerr* and *Pennington;* to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade "cloaked with the mantle of a campaign to influence governmental action." (Jt. App. 59.)

SUMMARY OF ARGUMENT

The Ninth Circuit decision was correct in holding that defendants' conduct is not exempted from the Sherman Act under any decision of this Court, specifically *Noerr, Pennington* and *Button.* It correctly concluded that defendants' activities are condemned by the Sherman Act because their conduct is similar to that of the defendants in the patent and other antitrust cases where a combination engages in predatory conduct to unreasonably restrain trade or destroy competitors.

I. This Case Is Not Within the Noerr-Pennington Doctrine Because Defendants' Conduct Was Mere Sham

The *Noerr-Pennington* doctrine does not extend to the use of adjudicatory processes of government in a scheme to restrain trade. This position will be demonstrated under heading II, infra. Even if the *Noerr-Pennington* doctrine extends to joint approaches before adjudicatory bodies it does not immunize defendants' conduct because it is an "ostensible" rather that "genuine" attempt to induce governmental action.

The defendants challenge the allegations of the complaint, contending that they were indeed honestly and genuinely seeking to induce governmental action by making the best case possible in support of their indiscriminate protests. They argue that any additional burdens imposed on applicants were merely incidental to these genuine efforts. On the other hand, the complaint alleges that the intent and purpose of defendants' program of litigation was to deter and put a stop to the filing and prosecution of applications not by influencing or inducing governmental action but rather by increasing to prohibi-

tive levels the costs of obtaining additional business rights. Plaintiffs submit that the issue of the "genuineness" of defendants' efforts to induce governmental action is a question of *fact*, and not of law, which entitles plaintiff to a trial on the merits.

Defendants' argument that the Ninth Circuit opinion requires "unrealistic and esoteric speculation into degrees of intent" which "even those directly involved in genuine efforts to influence governmental action would have difficulty sorting out in their own minds" (Petitioners' Brief at 66) is fallacious and irrelevant because it assumes the precise question to be decided. If defendants' efforts are genuine and the *Noerr-Pennington* doctrine extends to the adjudicatory functions of government then defendants' activities are protected. If defendants' efforts are merely ostensible use of government there is no protection and defendants are liable under the Sherman Act. This is a question of fact which cannot be disposed of on a motion to dismiss for failure to state a claim.

II. The Noerr-Pennington Doctrine Does Not Extend to the Adjudicatory Functions of Government

This Court's decisions in *Noerr* and *Pennington* dealt only with joint approaches with anti-competitive intent, before legislative and executive bodies and officials. In both cases, it was not disputed that the parties genuinely sought to induce governmental action detrimental to their competitors. These two cases, taken together, protect only lobbying, political activity and other similar efforts to induce the passage and enforcement of laws. The rationale for this exemption is that these representative

branches of the government need the information and views of their constituents in order to adequately represent them. Because the government may pass and enforce laws which restrain trade the people should be free to petition government to take such action.

The Courts and administrative agencies acting in an adjudicatory capacity do not have the power to pass or enforce trade restrictive laws, nor do they act in a representative capacity. The function of these bodies is to apply existing legal standards to concrete factual situations in order to resolve individual cases between the parties before the tribunal. Improper uses of the process of adjudication have consistently been condemned.

Where such improper uses are directed at suppressing or destroying competition they are proscribed by the Sherman Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963). In *Singer* this Court held that the Sherman Act applied to a conspiracy among competitors to use patent infringement litigation to suppress competition. In *Walker Process,* the unilateral *enforcement* through litigation of a patent known to be fraudulently obtained with the intent to monopolize the relevant market was held to state a claim under section 2 of the Sherman Act.

The present case is similar to *Walker Process* because the defendants agreed in advance to protest each and every application for common carrier certificates whether or not probable cause for their protest existed. Thus, in both cases the purpose of initiating the action was to use the *process* to restrain trade. *Singer* and other lower

court cases seem to indicate that the existence of an anticompetitive intent or purpose is sufficient to impose liability even where probable cause for litigation is present. This Court need not go so far to affirm this case.

There is no tenable distinction between patent and certificate litigation. Both involve partial monopolies granted by the government to private businessmen giving them the right to conduct business within the legal boundaries of the grant. Both are valuable property rights. Misuse of litigation involving either for anticompetitive purposes results in liability under the antitrust laws.

NAACP v. Button, supra, provides no protection for the defendants' conspiracy. Critical factors existed in *Button* which are not present in the case at bar: (1) the intent and purpose of the NAACP was lawful, (2) the processes of the courts were not being used in an "oppressive, malicious or avaricious" manner (371 U.S. at 443), and (3) the NAACP was engaged in "political activity"—petitioning government for the vindication of the constitutional rights of a minority.

The California Public Utilities Commission and the Interstate Commerce Commission, in the exercise of their licensing function, are engaged in adjudication. *Hanna v. Larche,* 363 U.S. 420 (1960); *Greene v. McElroy,* 360 U.S. 474 (1959); *People v. Western Airlines, Inc.,* 42 Cal. 2d 621 (1954). While these agencies need information which existing certificate holders may provide, such information must be communicated within the procedural and substantive guidelines and for lawful purposes relevant to the adversary proceeding involved. Where a combination implements a program of indiscriminate protests

for the purpose of destroying competition by deterring the filing and prosecution of applications and thereby bring the licensing process to a standstill the adjudicatory process is abused and the Sherman Act violated.

III. Defendants' Conspiracy Is Not Protected by the First Amendment

The First Amendment does not protect the defendants' conspiracy for two reasons. First, the right to petition government is not an absolute right, *Adderley v. Florida,* 385 U.S. 39 (1966), reasonable restrictions upon its exercise are permissible. Second, the right exists only where persons genuinely seek redress for grievances.

One cannot exercise his constitutional rights in a manner and for the purpose of depriving another person of his constitutional rights. *Citizens Publishing Co. v. United States,* 394 U.S. 131 (1969). The defendants may not use their right to free access to the courts and administrative adjudicative bodies to destroy plaintiffs' access to those bodies. Furthermore, defendants may not use their right to petition government to avoid liability under a valid statute proscribing restraints of trade. Cf. *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949). The case of *NAACP v. Button,* supra, does not protect the defendants because the defendants in the instant case acted with an unlawful purpose, used the process of litigation for an end entirely foreign to its function and because the defendants were not genuinely petitioning government. In *Button* this Court carefully distinguished the conduct of the NAACP from the types of conduct traditionally condemned by the courts: "the oppressive, malicious, or avaricious use of the legal process for purely private

gain" (371 U.S. at 443). The defendants' conduct is clearly in the latter category.

If a balancing test is applied the following considerations should be weighed. On one side, the defendants' right to free access to the courts and administrative adjudicative bodies and the desirability of communication of information to the government at no cost to the government. On the other side, the plaintiffs' right to free access, the strong public interest in enforcement of the antitrust laws, the public interest in effective regulation of the trucking industry and the public interest in preserving the integrity of the adjudicatory process. The result of such a balance requires that the Sherman Act be applied to this case.

The proper test, as applied by the Ninth Circuit may be stated as follows: where it can be shown that a group of competitors combine and conspire to use, regardless of the merits of their case, the judicial *processes* and *procedures* to unreasonably restrain trade rather than seeking that restraint through governmental action a violation of the Sherman Act exists.

Defendants object to such a test as being too vague and uncertain and, therefore, creating a "chilling effect." This test requires the finding of an intent or state of mind for liability to arise as do many other tests in the First Amendment area. (e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).) Furthermore, any incidental restraint arising from a valid statute regulating a subject within governmental power is not sufficient to invalidate the statute. *Younger v. Harris*, 401 U.S. 37 (1971). Since defendants in this case are "hard core" violators they

should not be permitted to assert the purported difficulties which another person acting in good faith might experience. *Adderley v. Florida,* supra.

IV. The Alleged Conspiracy Is Beyond the Control and Expertise of the Commissions

Contrary to defendants' assertions, the commissions are incapable of controlling the alleged conspiracy. First, if the defendants have a First Amendment right to use the adjudicative *process* to restrain trade which immunizes them from liability under the Sherman Act that right would equally protect them from application of any rule or regulation of the commissions proscribing the use of procedures to restrain trade or defeat the power of the commissions to regulate.

Second, if such a rule or regulation were to withstand constitutional challenge it would be unworkable. It would require a long and complex hearing on the issue of standing and would require the commission to examine into difficult questions of fact, concerning purpose and intent, beyond the expertise of the commissions and more appropriate for court determination.

Even if the commissions could control defendants' conspiracy, this Court has consistently held that in the absence of an express exemption or implied immunity the Sherman Act applies to regulated industries. *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). The Sherman Act applies to this case.

V. Review of Lower Court Authorities

A summary is set forth which indicates that the present case is unique. All prior cases involve situations

where it is clear that the defendants actually intended to induce governmental action detrimental to their competitors.

ARGUMENT

Introduction

First, this case comes to the Court on a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) FRCP. This Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Jenkins v. McKeithen,* 395 U.S. 411 (1969); *Columbia Broadcasting System, Inc., v. Poller,* 368 U.S. 464 (1962). Plaintiffs submit that if a "sham" exception to the *Noerr-Pennington* doctrine exists, then, regardless of whether or not the doctrine extends to the concerted use of judicial and administrative adjudicative processes to restrain trade, the decision of the Court of Appeals must be affirmed. Whether defendants' activities were "mere sham" or "genuine" attempts to induce governmental action of necessity presents a question of *fact* which can only be resolved after plaintiffs have had an opportunity to present evidence to the trier of fact.

Second, petitioners' brief does not confront the case actually alleged in the First Amended Complaint. This they have avoided by arguing a case which assumes that everyone concedes that the defendants' sole activities were genuine attempts to induce lawful governmental action.

This mischaracterization is manifest throughout the petitioners' brief.[6]

The facts of the present case are far different.[7] The complaint alleges a conspiracy to restrain trade and destroy

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[6] 1. ". . . where there is no allegation that defendants' efforts to influence the administrative bodies and courts were other than genuine, ..." Petitioners' Brief, Questions Presented, Question No. 1 at 3. It should be noted that this statement appears for the first time in the Brief. It was not present in the questions presented by the Petition for Certiorari. Compare with Petition for Writ of Certiorari, Questions Presented, Question No. 2 at 3.

2. "There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine, ..."Id. at 13. This statement also appears for the first time in the Brief. Compare Petition for Writ of Certiorari at 7.

3. "In the present case the complaint concedes that there was a genuine intent to influence the ICC and PUC and the reviewing courts in making their determinations in certificate matters." Id. at 20.

4. "The Ninth Circuit conceded that the alleged intent to influence the ICC and PUC was genuine, ..." Id.

5. "The present complaint, like *Pennington,* involves alleged efforts to influence public officials to take certain action within the bounds of their discretionary authority which would have an anti-competitive effect, ..." Id. at 26.

6. "The activities alleged are simply concerted applications to public officials vested with power to take trade-restrictive action." Id.

7. ". . . the defendants' objective of persuading the ICC, the PUC and the courts to draw certain conclusions in the public interest." Id. at 54.

8. "That the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority." Id. at 65.

[7] Indicative of the clear necessity to mischaracterize the allegations in order to argue the issue they wish to argue rather than the one established by the complaint, defendants have seized upon one subparagraph of the complaint under "Violations" and have characterized it as a "concession" to their contention that the plaintiffs allege only a genuine effort to influence government action. (Petitioners' Brief p. 45.) Even as to that subparagraph (para. 8H(10), Jt. App. p. 10), selective editing was required to achieve the desired language. Defendants have ignored other and related charges made in paragraph 8 A through I. When subparagraph 8H(10) is read in full and in its clear context with the re-

competition directly through the utilization of the forms and procedures of adjudication. It was the program of inexorable opposition—not the resulting determinations of the affected agencies and courts—which was to produce the restraint. As the Ninth Circuit stated "[t]he purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it." (Jt. App. 58.) The complaint so alleges. (Jt. App. 4-11.)

This basic mischaracterization by the petitioners defines in stark outlines the fundamental issue of fact raised by the complaint and constitutes cogent evidence that a trial on the merits is required for its resolution.

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mainder of paragraph 8 of the complaint, it is clear that the sole purpose of the combination was to discourage filings and prosecution of applications for rights.

In discussing the opinion of the Ninth Circuit (Petitioners' Brief p. 10), defendants importantly misquote the language of the Court of Appeals which drew a distinction between "administrative *adjudicative* processes" on the one hand and joint efforts to influence legislative and executive actions on the other hand. Since one of the grounds for the Ninth Circuit's ruling was a determination that certificate proceedings were adjudicative rather than legislative in nature (Jt. App. p. 50), defendants' omission of the word "adjudicative" from the language of the court is but a further attempt on their part to argue this case as though mere administrative action rather than the adjudicative process is what defendants were employing in their scheme of restraint. The Ninth Circuit's opinion clearly makes the distinction between pure administrative actions and the protectable interests involved there, and administrative and court adjudicative processes and functions and the different interests there at stake. (Jt. App. p. 52 n.6.)

I. THE COURT OF APPEALS' DECISION MUST BE AFFIRMED, EVEN IF THE NOERR-PENNINGTON DOCTRINE EXTENDS TO CONCERTED USE OF JUDICIAL AND ADMINISTRATIVE ADJUDICATIVE PROCESSES, BECAUSE THE CONDUCT ALLEGED IN THE COMPLAINT IS WITHIN THE "SHAM" EXCEPTION DECLARED IN NOERR

In *Eastern Railroad Presidents Conference v. Noerr*, *supra*, this Court enunciated an exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscriptions of the Sherman Act. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). In *Noerr*, the Court held that the Sherman Act should not be applied to "mere attempts to influence the passage or enforcement of laws," (365 U.S. at 136), even though motivated by an intent to restrain trade and destroy competition. Three reasons were given for this exception.

(1) Such activities are "political" and "essentially dissimilar" from the agreements traditionally condemned by the Sherman Act.

(2) Application of the Act to such activities "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade" by preventing the people from communicating their wishes to their representatives in government.

(3) Application of the Act to such political activities would raise important constitutional questions.

The *Noerr* case arose out of a fierce public relations battle between the railroad and trucking industries over long-haul freight business. The truckers sued the railroads alleging that the defendants had conspired to restrain

trade in and monopolize the long-haul freight business. The alleged conspiracy involved a publicity campaign, aimed at the legislatures of several states and the Governor of Pennsylvania, designed to promote the enactment of laws and law enforcement practices detrimental to the trucking industry and favorable to the railroad industry. The railroads' campaign was "highly successful" 365 U.S. at 144, securing among other things the veto of a "Fair Truck Bill," which would have increased maximum weight limits for trucks using state highways, by the Governor of Pennsylvania.

The plaintiffs sought broad injunctive relief but limited their claims for damages to the loss of business resulting from the Governor's veto. Id at 130. Thus, the only predicate for damages was valid governmental action which was protected from liability under the antitrust laws. *Parker v. Brown,* 317 U.S. 341 (1943); *United States v. Rock Royal Cooperative, Inc.,* 307 U.S. 533 (1939.)

This Court found that "all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws" (365 U.S. at 142.) Thus, having concluded that all the activities, including the publicity campaign using the so-called third party technique, constituted solely political activity, the immunity stood despite the fact that the truckers sustained some *direct injury* as an *incidental effect* of the railroads' campaign to influence governmental action. The guidelines of *Noerr* clearly show that genuine efforts to influence the passage and enforcement of laws are immune though such efforts may have the incidental effect of direct injury to competitors.

The *Pennington* case merely affirms the principles established in *Noerr*. *Pennington*, like *Noerr*, involved concerted attempts to use lobbying and political pressure in order to influence members of the executive branch of government. As such, *Pennington* neither enlarges nor shrinks the Sherman Act immunity created in *Noerr*.

In *Pennington*, a small coal company charged (in a counterclaim to a union action) that the United Mine Workers Union had conspired with certain large coal companies to drive smaller companies out of business in exchange for higher wages for union members. The *Noerr* issue arose from an agreement between the union and large companies to approach the Secretary of Labor and secure the establishment of a minimum wage rate, under the Walsh-Healy Act (41 U.S.C. §§ 35, et seq.) which would have prevented small coal operators from selling to the Tennessee Valley Authority (TVA) "term contract" market. Joint approaches were also made to solicit the purchasing agents for the TVA to curtail their purchases in the "spot-market" which was largely exempt from the minimum wage requirements of the Walsh Healy Act. In short, the *Noerr* issue involved strictly lobbying of and political pressure on members of the executive branch of government to induce governmental action detrimental to the smaller, non-union coal companies. These activities involved none of the characteristics associated with the traditionally condemned restraints enumerated in the *Noerr* opinion. Rather they were "political activity" and, therefore, clearly within *Noerr's* protection.

The *Pennington* case ruled joint efforts to influence public officials were shielded from the Sherman Act by *Noerr*, "regardless of intent or purpose . . . even though

intended to eliminate competition." (381 U.S. at 670.) *Pennington* did not hold, nor did *Noerr*, that use of governmental adjudicatory machinery to harass and deter competitors was permissible where the intention was to employ such machinery as the means of restraint rather than government action. The *sine qua non* of immunity in both *Noerr* and *Pennington* is that the restraints desired must genuinely be sought by the actors to be achieved through government action.

In both of these cases the plaintiffs (counterclaimants in *Pennington)* sought damages for injuries resulting directly from action taken by governmental officials. In both it was conceded that the antitrust defendants actively and honestly sought to induce government to take action prejudicial to their competitors. The "genuineness" of these efforts was not disputed.

This Court recognized in *Noerr*, however, that governmental processes might be involved, in appearance only, in the creation of a restraint of trade and that such appearance should not serve to immunize a conspiracy from normal Sherman Act standards. In the Court's language:

> "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

Plaintiffs have alleged in paragraph 8 of the complaint (Jt. App. 4-10) that defendants' plan and the implementation of it were aimed directly at competitors and not at the agencies; that to influence the agencies and the courts

was not what the defendants sought to achieve; that the result of defendants' conspiracy was to force competing truckers to refrain from filing any applications for certificated rights, and, as to those who filed, to force them to abandon or compromise their applications through settlement on defendants' terms.

Questions of whether or not defendants' activities were "political" within the meaning of *Noerr* are immaterial if defendants have not restrained trade through government decisions or genuine efforts to obtain them. There is no dispute over this principle. Not all combinations which result in a restraint of trade are *Noerr*-protected simply because their restraint involves some form of government procedure.

The sum total of defendants' arguments must be that the sham exception does not exist. By definition that exception must include some government involvement. Given the premise that the intention was to restrain trade, defendants argue that the difficulty which they would encounter in "sorting out in their own minds" whether they were genuinely seeking to influence government or seeking to create a restraint using government as a guise only, must be resolved in their favor. This is no more than suggesting a conclusive presumption that if government is employed at all, no sham exception is permissible because of the "chilling effect" which would result from the difficulty of "sorting out" what their intent truly is. (Petitioners' Brief p. 66.)

It is necessary to determine precisely *how* government is involved, and *how* its processes are used. Where a government agency is genuinely petitioned and a restraint

is the product of a government decision or the genuine attempts to influence a decision, then—but only then—the combination is not subject to the Sherman Act even if its members' actual motives were to restrain competition. The need to protect the flow of information necessary for the government to act in its "representative capacity" depends upon leaving unfettered the channels through which those who are governed may petition or communicate with those who govern. The Court in *Noerr* recognized that these values outweigh the values of declaring illegal combinations which restrain trade by using governmental processes. Undesirable as such combinations are, to illegitimize their activity in order to protect the trade of their target competitors would have the dangerous side effect of impairing the government's ability to govern on the basis of the fullest possible knowledge of what is at stake. Thus, even where the intent and the effect of the conspiracy are clearly to damage its competitors, where they are effected through a genuine seeking of governmental action, such petitioning vitiates the otherwise illegal restraint, at least for antitrust purposes.

Where a conspiracy to restrain trade does not in fact use governmental processes to obtain government action, however, the values inherent in protecting an exchange of information and access to government are not present, and the need to forego an examination of the conspiracy's intent and methods of restraint does not arise. Where governmental processes are not used in a genuine effort to influence government, a conspiracy to restrain trade is as subject to the antitrust laws as it normally is where there is no use of governmental processes at all.

Given this distinction between genuine and sham attempts to influence government, it remains only to be applied to the allegations in the present case. Defendants contend that their actions and purpose were primarily to influence governmental agencies to deny plaintiffs' applications or otherwise to rule in favor of defendants, and that the time, money and effort necessary merely to confront defendants' conspiracy were nothing more than incidental adverse effects of their allegedly genuine efforts to influence government, and thus only incidentally served to deter plaintiffs from access to governmental agencies.

Plaintiffs contend that defendants' activities and purpose were, on the contrary, directly to suppress and eliminate competition from plaintiffs and other potential competitors, not by attempting to influence the commissions to deny applications, but by preventing plaintiffs and others from seeking carriage rights, and that in the course of doing so, the defendants incidentally influenced some government decisions. The Ninth Circuit opinion states the correct proposition:

> "Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; *mere token opposition would not have the requisite deterrent effect.*
>
> "The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, *given the nature of the means employed,* defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occur-

> rence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the 'sham' exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. Cf. *Noerr, supra,* 365 U.S. at 143-144." (Jt. App. 59.) (Emphasis supplied.)

While defendants have not placed physical roadblocks in plaintiffs' path to the commissions and courts, they have created financial roadblocks of even greater deterrent effect.

Several elements of defendants' plan stand out in particular and support this interpretation. These elements are (1) defendants' publicity directed at competitors, not at the agencies or courts, customers or the public, announcing that every application would be protested and appealed to the fullest extent, and that huge sums of money were available to conduct the defendants' program; (2) the decision by defendants, made in advance of the filing of applications, to protest every application, indiscriminately, without knowledge of its contents or merits; and (3) protesting by defendant carriers who had no immediate interest in a given application other than that it affected the interests of a co-conspirator.

These unique elements are not present in a plan which genuinely seeks to influence government in the manner done by the railroads in *Noerr* or the NAACP in *Button*. Inclusion of such factors in a legitimate plan to influence government, even though anticompetitive in nature, is difficult to imagine. If these and similar factors alleged by plaintiffs do not make out a "sham" cause of action, the sham exception to *Noerr* is virtually meaningless.

Inasmuch as establishing a barrier, cutting off access between the plaintiffs and the commissions, was to be achieved through the mechanism of indiscriminate, blanket opposition, the defendants had the incidental opportunity of attempting to defeat some of the applications on their merits. As a result, defendants seize this point in their brief and attempt to argue that the sum of their actions represents nothing less than genuine efforts to defeat potential competitors' applications by influencing commission decisions. They state that "There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine" (Petitioners' Brief p. 13); that the "defendants' participation did influence commission decisions is specifically conceded [in the complaint]" (Petitioners' Brief p. 45); and that "the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority." (Petitioners' Brief p. 65.) Defendants attempt to conclude from these "admissions" and "concessions" that the complaint charges them only with a restraint produced through their influence over the commissions and the courts.

Defendants have continually misunderstood and misconstrued what is complained of in this case. The complaint alleges that defendants' intent and activities were to use government processes—not to genuinely seek to influence government officials—but as a lesson to plaintiffs and others that attempts to obtain carriage rights would be economically futile. To the extent that applications reached the commissions, of course, there was no reason not to try to be successful on the merits, to make the best

case the facts would allow, and hopefully influence commission decisions. But this was an incidental feature of a plan whose objective, function and effect was designed not to influence government officials, but to clog and encumber governmental processes, and thereby deter applicants even from reaching government officials.

Defendants implicitly recognize that the damage done by their conspiracy resulted not from attempting to influence government but from clogging government processes and thereby preventing plaintiffs from seeking rights. That plaintiffs and other truckers have in fact been deterred by defendants' conspiracy from filing applications has never been subject to dispute. The record on this matter speaks for itself. Plaintiffs and other truckers sought and obtained rights consistently until they were faced with the prohibitive costs in time and money resulting from defendants' joint agreement to file protests. It was defendants' conspiracy, implemented and publicized, which abruptly ended applications by plaintiffs and other competitors of defendants. No other conclusion is possible under the pleading.

Defendants also recognize that it was the prohibitive costs of meeting their protests which made it impossible for truckers to prosecute new applications. They simply argue that there is cost inherent in any protest proceeding and that cost as a deterrent factor, therefore, cannot serve as evidence of a direct restraint or in any other way serve to illegitimize their protests. Defendants' argument simply misses all questions of factual variance which distinguish a genuine from a sham attempt to influence government and attempts to characterize the

complaint as one which merely attacks legitimate protests and the costs involved there. It is clear, as plaintiffs have alleged, that the protests were made to prevent applicants even from "making their wishes known" to agencies and courts. As with all conspiracies, their individual power was transformed into immeasurably greater power merely through the accumulation and joint exertion of purpose and resources. "Any" protest certainly is not apt to entail the same kind or extent of expense to an applicant or to constitute the deterrent which defendants' combined, blanket protests entailed. The power exercised by a conspiracy to prevent access to the commissions is not inherent to the regulatory system. This Court has tolerated the restraints of conspiracies only in the narrowest of circumstances, where the protection of countervailing values simply left no alternative. Thus, in *Noerr,* this Court was careful to state that where the conditions for *Noerr* protection are not present—where the conspiracy is not shown *as a matter of fact* to effect its restraints through genuine efforts to obtain governmental decisions—the constitutional values of protecting governmental decision-making and access thereto are absent and the direct restraint resulting from the conspiracy's activities is subject to the Sherman Act.

To permit defendants' incidental attempts to influence government to justify their blocking of plaintiffs' access to rights would be to permit the tail to wag the dog. If such were the case, a single genuine protest before a government agency would constitute a license to obstruct an unlimited number of applicants even from attempting to obtain regulated rights. This, we believe, neither *Noerr, Pennington, Button* nor the Constitution will permit. The

sham exception in *Noerr* itself prevents such a possibility. Whether defendants' activities in this case were essentially genuine or ostensible attempts to influence government are questions of degree and of evidence to be weighed by the trier of fact. The only questions before the Court are (1) whether as a matter of law a trier of fact is permitted to find that defendants attempted to use government processes, not in a genuine attempt to influence government decisions, but in order directly to restrain competition, and (2) whether plaintiffs have alleged such to be the case here. The fact that a sham exception to *Noerr* exists as a matter of law is not subject to dispute. As for plaintiffs' allegations, we believe it is clear that they have stated that the purpose and effect of defendants' conspiracy was to prevent competitors from acquiring rights by use of government processes, not by attempting to influence government decisions. For this reason, plaintiffs reiterate that they have the right as a matter of law to prove to a jury that defendants' restraints were imposed not through attempts to influence the agencies and courts, but by interposing their conspiracy between plaintiffs and these forums.

In misconstruing the thrust of the allegations of the complaint, defendants have also misconstrued the relevancy of intent and purpose in this case. They cite language from *Pennington* which states that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." (381 U.S. at 670.) From this they argue that their intent is irrelevant in this action for all purposes.

In so doing, they have begged the very question presented—namely, whether their plan of action was a genuine attempt to influence government officials, or merely a direct obstruction of competitors. It is clear from *Noerr* and *Pennington* that intent and purpose to restrain competition become irrelevant only if it is shown that there was in fact a genuine attempt to influence government officials. Once that is shown (and there were no allegations or issues to the contrary in those cases), the conspiracy's ultimate intent becomes irrelevant. But the threshold question as to whether defendants' conspiracy was genuine or sham must first be asked, and to answer this question it is relevant to show not only that their actions, viewed objectively, constituted a mere ostensible use of government processes, but also that they intended their actions to be ostensible rather than genuine. If, for instance, plaintiffs could produce a letter authored by defendants stating that "In entering massive protests before the commissions, our intended objective is to deter further applications, not to influence commission decisions," that stated intent would be relevant to a showing that defendants' actions were in fact a sham rather than a genuine use of government. Plaintiffs recognize it is inappropriate to discuss evidence. The above example is given solely to demonstrate that the issue is one of fact. If their activities are found to be genuine attempts to influence government, under *Pennington* their ultimate intent to damage plaintiffs is irrelevant. But if their activities are found to be a mere ostensible attempt to influence government, to disguise their direct restraint of competition, the protections afforded by *Noerr* do not apply and defendants' intent to damage plaintiffs is

merely one factor among many in proving an antitrust violation.

Defendants' attempt to characterize their activities as genuine within the meaning of *Noerr* misses other distinctions between *Noerr* and the present case as well. In *Noerr*, there was no allegation or evidence that the thrust of the defendants' activities was other than to influence legislation or other governmental action. In *Noerr* the Court made clear that even including the third party publicity campaign, "all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws." (365 U.S. at 142.) There was some direct damage to competitors but the Court made it clear that direct damage resulting as an incidental effect of genuine efforts did not remove the exemption. Contrary to *Noerr*, the complaint pleads that defendants' plan was not to restrain trade by genuinely seeking government action, that the restraint was their program of deterrence and that indirect damage that resulted from their influencing decisions was but an incidental effect of the plan of deterrence.

In *Pennington* and *Button* too, there were no allegations that any interested parties were restrained from access to the government officials involved. In fact, in *Button* the Court found for the NAACP in order to protect a group's access to government and their right to make their wishes known—the very thing for which plaintiffs are seeking protection in this case.

The importance of protecting plaintiffs' access to the PUC and the ICC is nowhere better illustrated than in defendants' own brief. In arguing that the commissions

must exercise great discretion in adjudicating applications for rights and transfers defendants point out the need for regulatory agencies to act on the basis of a wide range of information from those affected by their decisions. According to defendants, this need is so compelling that existing certificate holders are elevated to a position of public trust, vindicators of the public interest.

> "In carrying out their function of public trust in participating in certificate proceedings, existing certificated carriers can furnish not only factual information readily available to them respecting their respective operation, but information and opinions based on practical experience on such subjects as the effect upon service efficiency arising from a proliferation of certificates, the reaction of given segments of the shipping public to the presence of a new carrier, the problems of holding patronage, the manner in which new traffic can be generated, and the impact of varying degrees of competition upon rates. These and other subjects all have significance in assisting the commission to act in the public interest.
>
> "The position which existing certificate holders occupy in protesting certificate applications may be analogized to that of a 'private attorney general.'" (Petitioners' Brief p. 47.)

According to defendants, all of this information is relevant in answering the question "does the public convenience and necessity justify the granting of this certificate? The complaint, however, alleges that it was the purpose of defendants' conspiracy to permit as few applications and as little information from competitors as possible to reach the agencies for their consideration—to prevent the above question from being asked, let alone

answered. How is it possible, then for the commissions and courts to answer these questions of public interest at all, much less accurately, if many of the businesses affected are precluded or deterred, by an anticompetitive combination seeking such deterrence, even from applying and thereby making essential information known? Defendants' argument cited above is made in order to support their contention that they must be protected in their access to the commissions even if it takes the form of a conspiracy against plaintiffs' access to the commissions. Plaintiffs agree that defendants should be ale to make their wishes known to governmental bodies involved even if their ultimate intent is to defeat plaintiffs' applications and thus eliminate competition. But defendants have done something more, and in so doing have gone beyond the protection of *Noerr*, *Pennington*, and other authorities cited by defendants. In conspiring to preclude all but themselves from access to the government, defendants have conspired to defeat the discretionary system which they espouse at great length in their brief; have conspired to defeat the constitutional values of exchange of information and the right to petition valued in *Noerr* and *Button*; and have conspired to defeat the individual rights of competitors to carry on their businesses free from the contrived restraints imposed upon them not by government decisions or the attempts of defendants to obtain them, but by a massive combination standing between plaintiffs and the governmental agencies involved.

Certainly not every form of government involvement can serve to cloak otherwise direct restraints with *Noerr* immunity. One of the premises of the sham exception is

that some form of petitioning of government could be shown. Yet the court recognized that a question of fact remains as to whether this petitioning might be "ostensible" rather than "genuine."

Even if one assumes, as defendants argue, that public officials involved in judicial determinations constitute "government officials" who might be genuinely petitioned by a conspiracy, nonetheless it is the kind of behavior and degree of restraint which determines whether defendants' conspiracy was a genuine effort to influence government, or was essentially a mock attempt to do so with the genuine effort directed at deterring competitors from seeking rights. Only the trier of fact can answer these questions.

Defendants have taken the position that the "sham" exception is limited to cases in which there is direct interference with *business relationships* of a competitor and would limit this term to the relationships between the competitor and his suppliers or customers. (Petitioners' Brief p. 62; Petition for Writ of Certiorari p. 20.) The implication is that direct interference between plaintiffs and the commissions cannot constitute "mere sham" regardless of the method used to cut off access to the commissions. It is clear, however, that a business relationship does exist. Defendants directly interfered with the process of market entry—not by seeking government action—but by interposing their conspiracy between government (the sole source of the right to engage in the common carrier business) and the businessman. Such interference is indistinguishable from interference, with anticompetitive intent and purpose, with the relationship between a banker and a businessman in need of a line of credit to commence or expand a business.

In *Noerr* and *Pennington* the defendants sought to use the functions of government for their anticompetitive purposes. They sought to *induce the government to act.* The railroads in *Noerr* and the union and large mine owners in *Pennington* were found to have made a genuine effort to influence legislative and executive action. This was not disputed.

In the present case, such a dispute is at the heart of plaintiffs' action. The courts and commissions, though not so intended, have been rendered useless to plaintiffs and other competitors of the defendants by the employment of an overwhelming combination of capital and personnel devoted to the purpose of foreclosing access to these bodies. Certainly *Noerr* does not protect the plan of combined individuals to use the forms and procedures of government in order to exclude competitors from access to government.

II. IN ADDITION TO THE SHAM EXCEPTION DEFENDANTS ARE LIABLE BECAUSE THEIR ACTIVITIES ARE NOT PROTECTED BY NOERR-PENNINGTON OR BUTTON, AND, SINCE THEY CONSTITUTE MISUSE OF ADJUDICATORY PROCESSES FOR ANTICOMPETITIVE PURPOSES, FALL WITHIN THE RULES EXPRESSED IN WALKER PROCESS AND SINGER

A. Defendants' activities are not protected by Noerr-Pennington because they are critically different from the behavior of defendants in those cases

The first part of defendants' argument (Petitioners' Brief p. 29) deals with the so-called "essential dissimilarity" point made in the *Noerr* decision. We believe that defendants have treated this point with conspicuous superficiality and have failed to fully deal with the critical areas in which their own behavior is claimed by them to be similar to that of the *Noerr* defendants.

In *Noerr* the Court expressly identified the factors necessary for "essential dissimilarity" to exist between behavior condemned by the Sherman Act and that protected in *Noerr,* an agreement to jointly seek legislation or law enforcement detrimental to competitors (365 U.S. at 136). Defendants argue merely that "influencing public officials," as used in *Pennington,* is the sum total of the charges against them. Thus, they reason, since judges and commissioners are public officials who conduct adjudicative proceedings, defendants' behavior is within the protection of the *Noerr-Pennington* cases. The reasoning continues that, based upon the foregoing premise, such activities cannot be those traditionally prohibited by the Sherman Act because the activities in the *Noerr* and *Pennington* cases were not held to be prohibited. Defendants cannot get home that easily. We submit that defendants' analysis of this point is wrong and leaves a huge void in their consideration of comparative behavior in the context of the function of government involved.

First, when government officials act in an adjudicatory capacity as contrasted with those who act in a representative capacity, "there is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely and the atmosphere consistent with effective performance of their respective functions." (Jt. App. 52.)[8] As will be seen in the discus-

[8]As an example of the condemnation of lobbying before the ICC with respect to a contested proceeding, the ICC Canon of Ethics prescribes the following:

> "8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act [49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.] the Commission exercises

sion of the First Amendment, the interests protectible, as well as rules of access, are also different.

Second, the case at bar deals with a conspiracy to restrain trade—not by genuinely seeking favorable government decisions—but by intentionally imposing procedural barriers thus preventing and deterring others from free access to government processes.

Third, the case at bar deals with an agreement on the part of defendants to give up their trade freedom, a practice commonly condemned by the Sherman Act, whereas in *Noerr,* no such agreement was present.[9] Defendants

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quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communciations to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission."

[9]As this Court pointed out in discussing the principal issues of the *Pennington* case, such agreements strike at the very roots of the antitrust policy:

> "[f]or the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." 381 U.S. at 668.

This same point was made in *Noerr* where the Court declared that defendants' activities there bore:

have correctly pointed out the *Noerr* decision did not hinge solely upon the essential dissimilarity between antitrust violations and political petitioning. There were two other factors, specifically (1) the substantial impairment of the abilities of legislative and executive branches acting in a representative capacity to receive information,[10]

". . . very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." (365 U.S. at 136.)

Because the complaint alleges each defendant was bound to oppose each application filed anywhere by any carrier, this necessarily included applications of members themselves. This point is conceded in Petitioners' Brief, p. 14 n. 4. It is clear that each defendant gave up its own trade freedom as well as agreeing to take trade freedom away from carriers who were not members. (Jt. App. 5 para. 8B, p. 7, para. 8F.) In the common carriage business the first and indispensible step required to engage in trade is the filing of an application for rights to do so. This decision is not a political or even a regulatory decision, but strictly a business decision made by a businessman without anyone's prior approval. However, when such a carrier binds himself to other carriers in a scheme designed to limit not only his own freedom to file applications, but the freedom of others, clearly it is a "similar arrangement" to those which the Sherman Act intended to condemn. Each defendant agreed that it would share in paying for the prosecution of protests, even against itself, should it decide it needed more rights. Although the complaint alleges no agreement that defendants would refrain from filing applications, it is clearly a permissible inference that once having jointly agreed to finance protests on *all* applications, there was an agreement not to seek further rights. Even if such inference were not permitted, the economics of the agreement itself placed a great impediment, including the weighing of the interests of the other defendants, in the path of the exercise of the trade freedom of defendants as far as the filing and prosecution of applications for rights are concerned.

[10]In the language of *Noerr*:

"In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of gov-

and (2) the possible impairment of the constitutional right to petition by allowing Sherman Act application.[11] For all of these reasons, the Court concluded as follows:

> "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." (365 U.S. at 138.)

The behavior of defendants here was critically and importantly different in nature from that of the defendants in *Noerr*. The activities here were aimed and directed at competitors—not at government—and the forum of government used was a different one than in *Noerr*. It will be clear after consideration of defendants' conduct in the context of the function of government they chose to use to restrain trade, when measured against the principles of *Noerr, Button* and the patent cases, that applica-

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ernment act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." (365 U.S. at 137.)

[11] In the language of *Noerr*:

"Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above." (365 U.S. at 137-38.)

tion of the Sherman Act is required. This is so because in the context of adjudicatory forums, the processes and procedures may not be used for the purpose of restraining trade.

Noerr and *Pennington* protect only lobbying, political activity and similar forms of petition aimed at securing the passage and enforcement of laws. In *Noerr* the Court was precise in defining the exception to the Sherman Act. The Court's language clearly demonstrates that it was dealing with a question of substantial impairment of the power of government to take action through its legislative and executive officers (365 U.S. at 137), and with "...the whole concept of representation..." and with "the ability of people to make their wishes known to their representatives." (365 U.S. at 137.)

Throughout the opinion, the Court emphasized that it refrained from applying the Sherman Act to activity which was political in nature and which involved the right of petition to the legislative and executive branches of government. The Court stated no fewer than eight times that it did not intend to interfere with the legislative or executive passage and enforcement of laws.[12]

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[12] 1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135.) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to *persuade the legislature or the executive to take particular action with respect to a law. . . .*" (365 U.S. at 136.)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for*

At no time, however, did the Court state or imply that it could not or would not control, investigate, or sanction misuses of processes within the courts themselves or within agencies which exercise judicial powers and over which the courts have long exercised the power of judicial review. The court in *Noerr* made no such statement because no such issue was presented in that case, and because to do so in any event would be to overturn well established law which has permitted—indeed compelled—courts to guard with utmost care the right to fair and full hearings in adversary proceedings. Guarding against a misuse of such processes in the courts and administrative agencies has traditionally been considered not to infringe upon the constitutional right to petition or the functions of other branches of government. The courts have thus not refrained from applying statutory or common law remedies where such abuse exists, no matter what the purpose of such abuse, antitrust or otherwise.

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the purpose of influencing the passage or enforcement of laws." (365 U.S. at 137.)

4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar* as those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139.)

5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138.)

6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, *all of the evidence* in the record, *both oral and documentary*, deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142.)

7. "No one denies that the railroads were making a genuine effort *to influence legislation and law enforcement practices.*" (365 U.S. at 144.)

8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145.)

Plaintiffs believe that the Court in *Noerr* clearly and unequivocally defined what it meant to protect. It called the activities political activity and lobbying. Plaintiffs believe that the Court meant nothing other than the plain meaning those words impart. When taken together with the facts of the case and descriptive passages of activities in the *Noerr* opinion, they are not subject to semantic disputes. This Court meant to protect only lobbying and political activities as they are commonly known and accepted in their traditional roles within the representative branches of government.

B. Defendants' activities are subject to the Sherman Act as demonstrated by the patent antitrust cases

The misuse or abuse of judicial procedures for anti-competitive purposes constitutes a violation of the Sherman Act, and has been condemned by this Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *United States v. Singer Manufacturing Co.*, 372 U.S. 174 (1963), as well as by a number of lower court decisions in the patent litigation and other contexts: *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.) *cert. denied*, 344 U.S. 837 (1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *United States v. Krasnov*, 143 F.Supp. 184 (E.D. Pa. 1956), *affirmed*, 355 U.S. 5 (1957); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

The patent cases impair the right of access to courts to a much greater degree than is required by the affirm-

ance of the case at bar. This is apparent from a reading of the opinions themselves and has been articulated in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) at 248 as follows:

> "Accordingly we make the following recommendations: a. Where it is shown that an infringement suit has, in fact, been brought as an integral part of an agreement or plan to violate the antitrust laws and that the defendant sustained resulting damages, treble damages for antitrust violation should be recoverable, whether or not there was a colorable claim of infringement."

The pleadings in this case are limited to the use of adjudicatory processes to restrain trade. Plaintiffs allege that defendants did not attempt to restrain trade by obtaining favorable decisions. Therefore, it is not necessary in this case to go as far as *Singer* and other cases discussed below. In this case, the defendants' agreement was to protest applications for which there was no probable cause for opposition as well as protests with probable cause. This agreement was made in advance of the filing of applications or knowledge on the part of defendants whether any given protest would have probable cause. It was to extend to each and every application on file or thereafter to be filed before the commissions. The purpose of the agreement was to foreclose access to operating rights by intimidating competitors with the threat of ruinously difficult, expensive and exorbitant opposition in adjudicatory proceedings. The predation in this case is unprecedented and, therefore, not directly analogous to any prior case known to plaintiffs. Either *Singer* or *Walker Process* is sufficient authority to sustain a ruling

favorable to plaintiffs because they go much further in condemning what more nearly approaches legitimate use of adjudicatory forums of government for anticompetitive purposes than does the conduct of defendants in the present case. However, the case at bar more closely resembles *Walker Process* than *Singer* and other lower court patent-antitrust cases.

In *Walker Process,* the defendant was alleged to know of the falsity of its claims before the Patent Office. From this it followed that the patent was fraudulently obtained and the infringement suit was brought without probable cause. In effect, the defendants were using the *processes* of the courts to restrain trade.

Singer appears to stand for the broader proposition recommended in the Attorney General's Report quoted above at 51. It held that a combination of competitors, which sought to suppress competition and monopolize trade, through the prosecution of infringement actions before the courts and agencies violated sections 1 and 2 of the Sherman Act even though probable cause existed to support this litigation. Even if *Singer* is read narrowly to require the absence of probable cause to constitute a violation, it is still ample authority to support this case. There is no need, for the purposes of this case, for the Court to resolve any ambiguity in the *Singer* case. We respectfully suggest that this should be reserved for a case which directly presents the issue.

In the leading case, *United States v. Singer Manufacturing Co., supra,* Singer conspired with two other companies to prevent the importation into the United States

market of Japanese competitors' sewing machines. The conspiracy and attempt to monopolize were accomplished in two steps. First, the defendants joined interests by withdrawing opposition to the patent applications filed by each company so that the broadest possible claims could be obtained under each patent; and then cross-licensing and assigning the patents to Singer so that it could enforce them against Japanese competitors in the American market. Singer then instituted a program of infringement actions in the courts and protest proceedings before the United States Tariff Commission, a quasi-judicial agency. (374 U.S. at 187-188.)

This Court held that the conspiracy and the proceedings taken pursuant to it were in violation of the Sherman Act. The Court recognized that cross-licensing agreements were not, standing alone, violative of the antitrust laws, but held that when such agreements were made to restrain competition they ran afoul of the Sherman Act.

> "Here the patent was put in Singer's hands to achieve the common purpose of enforcement 'equally advantageous to both' Singer and Gegauf and to Vigorelli as well. What Singer had refused Vigorelli, i.e., acting 'in concert against others' was thus achieved by the simple expedient of transferring the patent to Singer.
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> "Thus by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of merely protecting its own 401 machines—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the time, under the same umbrella. This the Sherman Act will not permit.
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> . . . .

> "The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of infringing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade, clearly established by the course of dealings, that condemns the transactions under the Sherman Act," (374 U.S. at 193-195).[13]

Singer was followed by this Court's decision in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., supra,* decided in 1965 after the *Pennington* case. In *Walker Process,* the plaintiff, Food Machinery, brought an infringement action. The defendant counterclaimed under section 2 of the Sherman Act alleging that Food Machinery had obtained its patent by means of actual fraud on the Patent Office and was using the patent to monopolize the relevant market by threats of infringement suits and the actual prosecution of the infringe-

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[13]It is incredible that, in seeking to distinguish the *Singer* case from the case at bar, the defendants should use the quotation from the concurring opinion of Mr. Justice White which appears at pages 57-58 of petitioners' brief. If the words "patents," "prior art," and "office" are replaced by the words "certificates," "applications" and "commissions" and the stated public interest in patents replaced by the public interest protected by regulation by the trucking industry, Mr. Justice White would be speaking of the case at bar. It is all the more incredible that defendants should emphasize the public interest in patents and the evils of subordinating that interest to private ends when they have consistently asserted in the courts below that the difference between patent litigation and certificate litigation is that no public interest is involved in patents whereas certificates are permeated by the public interest.

In fact, Mr. Justice White, in his concurring opinion, held that there were two independent grounds upon which the Sherman Act was violated: the agreement to withdraw from the interference proceeding *and* the conspiracy to jointly enforce the patents to suppress competition (374 U.S. at 197).

ment suit against Walker Process. The district court dismissed the counterclaim. This Court unanimously reversed the dismissal and remanded for further proceedings. Mr. Justice Clark, speaking for the court, held that the *enforcement* of the patent, by litigation would violate section 2 of the Sherman Act if the other elements of a section 2 case were present. (382 U.S. at 175.) In response to arguments that the counterclaim sought to cancel or annul the patent and, therefore, was properly dismissed, Mr. Justice Clark stated:

> "Walker counterclaimed under the Clayton Act, not the patent laws. While one of its elements is the fraudulent procurement of a patent, the action does not directly seek the patent's annulment. The gist of Walker's claim is that since Food Machinery obtained its patent by fraud *it cannot enjoy the limited exception to the prohibitions of section 2 of the Sherman Act, but must answer under that section and section 4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim.*" (382 U.S. at 176; emphasis added.)

It is clear that, contrary to the characterization in Petitioner's Brief at p. 57, it was the enforcement of the patent which violated the Sherman Act and not the fraud in its procurement.

This reasoning has been applied in a number of lower court opinions which have held agreemnts to use ajudicatory processes to restrain trade violative of the Sherman Act. In *Kobe, Inc. v. Dempsey, supra,* the plaintiffs joined together to bring a patent infringement action against the defendants. The defendants, by cross-complaint, al-

leged inter alia that the plaintiffs had conspired to restrain the defendants' trade; that the infringement action was instituted pursuant to this conspiracy; and that the infringement action was unjustified and brought in bad faith. After a trial, the court found that plaintiffs' conspiracy was a violation of the antitrust laws, awarded damages, and entered an injunction against the conspiracy. Plaintiffs appealed and the Court of Appeals affirmed. The plaintiffs in *Kobe* contended on appeal that they had believed there was a genuine infringement of their patents and that they had the right to use available legal forums in order to protect their interests. In response, the Court of Appeals stated:

> "[w]e fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. *At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.*" (198 F.2d at 424; emphasis added.).
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> "We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that although Kobe believed some of its patents were infringed, *the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor.* The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused. But when

considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme." (198 F.2d at 425; emphasis added.)

The Court of Appeals expressly recognized the destructive effects of a ruling which would permit unrestricted access to the courts for anticompetitive purposes:

"To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy." (198 F.2d at 425; emphasis added.)

In *United States v. Krasnov, supra,* the defendants were charged with conspiring to restrain trade and create a monopoly by excluding competitors from the defendants' patent pool and by harassing competitors with infringement suits. Similar to the present case, the defendants in *Krasnov* agreed to bring harassment suits upon the mutual consent of the members of the conspiracy and upon a sharing of the costs of the suits.

On the government's motion for a summary judgment the district court held that the defendants' activities violated section 1 of the Sherman Act. On the issue of the defendants' misuse of judicial processes, the court stated:

"[t]hat the harassing suits against competitors, previously discussed in some detail, were *designed as and were actually only harassing suits* is clear from an examination of the correspondence between the parties and the court feels that such conclusion is ines-

> capable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman Antitrust Act. . . ." (143 F.Supp. at 202; affirmed 355 U.S. 5 (1957).)

In *Lynch v. Magnavox Co., supra,* the plaintiff brought an antitrust action alleging a conspiracy to restrain trade and an attempt to monopolize. The district court sustained the defendants' demurrer to the complaint. The Court of Appeals reversed. The plaintiff had alleged that the method agreed upon by the defendants was to pool their patents in a conspiracy and then, " 'under the threat of patent litigation of all asserted rights of all of the parties to the pool and combination,' " to force competitors out of the market. (94 F.2d at 886.) More particularly, the defendants agreed to have one member of the conspiracy bring an action, followed by other members bringing the same or similar actions, to harass competitors with litigation until they were driven out of business. (Id.) Plaintiff alleged that the infringement suits were brought in bad faith and without probable cause or an honest belief that the patents held by defendants were valid. (Id at 887.) In response to this allegation, and in finding a good cause of action, the court stated:

> "We may assume that each of those acts would be lawful; and still a conspiracy might be shown. *If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.*" (94 F.2d at 889; emphasis added.)

In stating that the plaintiffs brought a good cause of action, the court stressed that it was the conspiracy to restrain trade, not just the actions filed by the conspirators, which constituted the antitrust violation. If the actions

filed in court were filed without probable cause or in bad faith, these actions standing alone would, of course, be illegal as antitrust restraints and malicious prosecutions. If these actions were filed with probable cause and in good faith, they would still be illegal since they were filed as part of a conspiracy to restrain trade. In either case, the court made clear that it was the purpose of the conspiracy itself, not the individual acts taken pursuant to the conspiracy, which determined whether a violation of the antitrust laws existed. In the present case, plaintiffs have alleged that defendants instituted their proceedings for the purpose of restraining trade and monopolizing the industry. Irrespective of whether defendants had colorable ground for protesting plaintiff's applications or not, if such proceedings were brought pursuant to an illegal purpose, such activities are prohibited by the Sherman Act.

See also *Stewart-Warner Corp. v. Staley*, 42 F.Supp. 140 (W.D. Pa. 1941) (Allegations that parties joined in concerted action to threaten competitors with bad faith litigation states a good cause of action under the antitrust laws):

Clapper v. Original Tractor Cab Co., supra (Attorneys' fees should be included in antitrust damages awarded against defendants who conspired to misuse patents by bringing unfounded suits against competitors).

Slick Airways, Inc. v. American Airlines, Inc., supra, is remarkably similar to the case at bar in terms of the method used to restrain trade—the forms and procedures of litigation—although much smaller in scope and magnitude, involving only one certification proceeding. *Slick* was a treble-damage action charging the defendants with

conspiracy to restrain trade and monopolize the air freight industry through predatory rate policies, abuse of the privilege of intervention and participation in Civil Aeronautics Board certification proceedings, and a campaign of unfair competitive practices. Defendants moved to dismiss for lack of jurisdiction. The court denied the motion, reasoning that even if all of the conduct of the defendants, standing alone, were legal, if undertaken pursuant to a conspiracy to restrain trade such conduct would violate the Sherman Act.

> "While it may be questioned whether any of this alleged activity by defendants of itself constituted illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objectives of conspiracy, *American Tobacco Co. v. U.S., supra,* 328 U.S. at page 809 . . ., and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy." (107 F.Supp. at 214)

To avoid the impact of the above cases the defendants have consistently argued that (1) patents are fundamentally different from certificates so that litigation involving patents is "private" while the same processes when applied to certificates are "political" and (2) in each of the patent cases, some activity other than litigation was present which constituted "cogent reasons for subordinating the First Amendment." (Petitioners' Brief p. 57.)

Access to courts has clearly been limited in order to protect the primary function and purpose of adjudicating procedures, which is to obtain decisions on the merits and not to restrain trade by their use. The patent cases cited

above would all have been decided in favor of the violator if the rule of law defendants argue for were embraced by the Court. We submit that the distinctions consequently asserted below by defendants between "private" and "public" litigation is no standard at all, much less a "bright line" sufficient to characterize certificate litigation as "public" and patent litigation as "private," hence protecting abusive use of processes in one and condemning it in the other.

Defendants attach significance to the fact that a certificate is revocable and that one may overlap another. Defendants fail to mention the certificates may also be bought and sold, or traded. On the other hand, as the argument continues, a patent is a property right, may be bought, sold or traded, and, once granted, exclusive and non-revocable. Defendants have argued below that public interest permeates certification proceedings rendering them "political" whereas patent proceedings are apparently devoid of public importance; that if the idea or device in a patent application meets the test of novelty and usefulness the granting of the patent is merely an automatic, ministerial act whereas the application of the public convenience and necessity test to a given petition for a certificate is so completely discretionary that it becomes a "political" judgment. Defendants failed to cite any authority for their assertion. Defendants ignore the fact that patents, although not revocable as such by a private action, may be cancelled or annulled by the government (*Mowry v. Whitney*, 81 U.S. (14 Wall.) 434 (1872)); may be held invalid after their grant; may be held unenforceable; may be subject to compulsory licensing after letters have is-

sued; and may be cancelled for abusive use. Patents are also subject to numerous antitrust restrictions upon their aggregation in pools and the manner in which they may be licensed. The courts have fashioned rules regulating patents which go far beyond the bare statutory language and constitutional provisions. The courts have exercised wide, and indeed effective, discretion in making such rules. Yet to say that litigation respecting patents is "political" activity is just as ridiculous as the same statement respecting certificates.

Certificated carriers are no less subject to the antitrust laws than patent holders. Both patents and certificates are forms of legal monopoly granted to private persons by the government. Both are subject to protection—and abuse—through litigation. The system of patents results from constitutional and statutory provisions rooted in a strong public policy which encourages invention.

> " 'A patent by its very nature is affected with a public interest . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. *The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds* free from fraud and other inequitable conduct and that such monopolies are kept within their legitimate scope.' " *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. at 177.

Defendants' description of factors considered in finding public convenience and necessity might very well have been copied from *Walker Process* in its description of the

public interest involved in the patent field. (Petitioners' Brief, pp. 16, 30 and 41.)

The involvement of public concern and discretion in private litigation does not convert such litigation into political expression. A combination of certificate holders, just as a combination of patent holders, which uses its combined economic power to strangle its competition through oppressive litigation must be condemned by the antitrust laws.

Defendants also argue that it is the quantity of discretion which a judicial body exercises in resolving a dispute which determines whether the resolution is political or private in nature. But that too is a bare assertion unsupported by analogy or authority. If discretion were the test, all antitrust litigation would be "political" and hence *Noerr* protected, for nowhere has Congress delegated greater discretion than it has in delegating to the courts the responsibility for resolving private disputes under the Sherman Act. Antitrust suits, certificate proceedings and patent litigation, like all other adjudication of private interests, have some effect on public policy. Yet, to recognize this fact does not transform private disputes into political activities.

The second point of distinction made by defendants is that several means, rather than solely litigation, were used in the patent cases to restrain trade. It is not valid to distinguish those cases from *Noerr* or *Pennington* on that basis. Such conclusion necessarily requires that the government related activity in both types of cases be considered similar in their exempt status and the cases distinguished only on the fact that other activity was present.

In *Pennington* there were multiple means used including government activity to restrain trade. In *Singer* there were multiple means used to restrain trade. However, the cases were treated differently by this Court. In *Pennington* the means which involved government were completely split off by the Court from other restraints and given an exempt status whether standing alone or as part of a larger plan. In *Singer* the means involving government were not split off but considered part of the whole restraint. The reason for the different treatment, we submit, is obviously because the Court considered the government related activity in *Pennington* to be critically different from the government related activity in *Singer*; not because *Singer* involved multiple means one of which was the use of government.

Further proof of the point is found by comparing *Noerr* and *Walker*, where only one means, government related activity, was used to restrain trade. This Court treated them differently. The reason for the difference was not that one or more than one means was used but that the nature of the government related activity involved was critically different. *Noerr* involved the legislative and executive branches, *Walker* the judicial.

C. Defendants' activities are dissimilar to defendants in Button and the union cases[14]

Defendants' activities are dissimilar to defendants in *Button* and the union cases as well as *Noerr* and *Penning-*

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[14] *NAACP v. Button*, 371 U.S. 415 (1963).
United Transportation Union v. State Bar of Michigan, ... U.S. ....., 28 L.Ed.2d 339 (1971).
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967).
Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

ton. The critical differences are that in *Button* and the union cases (1) the aims of the defendants were lawful, (2) the processes of the courts were not being used in an "offensive, malicious or avaricious manner" (371 U.S. at 443), (3) in *Button* it was recognized that litigation may well have been the only practicable means open to the defendants to petition government for the vindication of civil rights, thus (4) the NAACP was engaged in political activity. The presence of these factors entitled defendants in *Button* and the union cases to constitutional protection. None of these factors is present in the case at bar. These cases will be discussed more fully in the First Amendment arguments (infra p. 81). They are mentioned here because the conduct in those cases is essentially dissimilar from that of defendants in the instant case.

D. The Function of Granting Certificates, Transfers and Registration (after 1963) is Adjudicative

Adjudication is the application of a legal standard of greater or lesser generality to the facts of a specific case.

Defendants while admitting that the form of granting licenses is adjudicative in nature, argue that in basic essence it is "legislative" and because of the broad standard involved the determinations are tantamount to the "public interest." (Petitioners' Brief pp. 32-33.)

Their motive in singling out certificate proceedings for this special treatment is manifest. Their reasoning is that if the Court is convinced that certificate proceedings before agencies and courts occupy this unique position it follows they may use the adjudicatory process to restrain trade because by making such protests in certificate

proceedings they are engaged in "political expression." The Interstate Commerce Commission, in the exercise of its licensing functions, is engaged in adjudication. (See Statutes and Rules set forth in Appendix to Petitioners' Brief, pp. iii through xix, and Appendix to this Brief, pp. i to lxix.) The same is true of California Public Utilities licensing procedures. (See Statutes and Rules set forth in Appendix to Petitioners' Brief, pp. xix to xxvii, and Appendix to this Brief, pp. lxx to lxxxvii.)

The California Public Utilities Commission is established as a court of record by the state constitution. Cal. Constitution, Art. XII, §§22, 23. The Supreme Court of California in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119 (1913), soon after the establishment of the Commission, ruled that it exercised judicial functions, as well as purely legislative or legislative-administrative functions. The Court stated:

> ". . . it is proper to say that *we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature.* That judicial powers were with deliberation vested in the Commission the language of the constitution and of the legislative enactments following the constitution leave no doubt. Thus the constitution itself declares: 'The Commission shall have the further power . . . *to hear and determine complaints* against railroad and other transportation companies; to *issue subpoenas and all necessary process* and send for persons and papers; and the commission and each of the commissioners shall have the power to *administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record.*' (Sec. 22, art. XII.) While with-

out quoting, a reading of sections 22 and 23 of article XII of the constitution and of sections 53 to 81 of the Public Utilities Act *will establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment.* It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (Robinson v. Sacramento,* 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors,* 162 Cal. 14 [120 Pac. 780]).'' (Emphasis added.)

More recently, in *People v. Western Air Lines, Inc.,* 42 Cal. 2d 621, 268 P.2d 723, *appeal dismissed,* 348 U.S. 859 (1954), the Court was confronted with the question whether the decision of the PUC in a prior proceeding constituted a predicate for the application of collateral estoppel in a subsequent criminal proceeding. The argument of the defendant was that since the PUC was merely an administrative tribunal and not a court its decisions were insufficient for res judicata purposes.

The Court rejected this argument and reaffirmed the reasoning of the *Eshleman* case, *supra.*

''The defendant relies on the case of *Stratton v. Railroad Commission,* 186 Cal. 119, which contains declarations that appear to be contrary to other and later decisions of the courts on the subject. It was said in that case at page 126 that 'the commission is not

a judicial tribunal in the strict sense.' That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state.

. . . .

So, while it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power.

It was also said in the Stratton case that 'the commission is essentially an administrative and legislative tribunal, and not a court,' and the fact that the commission must make determinations of fact for its own guidance 'does not make it a court or change the character of its decrees from administrative or legislative orders into judicial judgments.' These and other statements in the opinion in that case are inconsistent with the decisions of this court both before and after it on the subject of the judicial power of the commission. Insofar as they are so inconsistent they are overruled.''

(42 Cal.2d at 631-32.)

The *Stratton* case, expressly overruled in *People v. Western Air Lines, Inc., supra,* was heavily relied upon by the Court in *Sale v. Railroad Commission,* 15 Cal.2d 612, 104 P.2d 38 (1940), (cited by defendants, Petitioners' Brief at 38-39) for its characterization of the PUC. The *Sale* case is further diminished in its vitality when it is recognized that the Court there failed to distinguish the various capacities, including judicial, in which the PUC acts, as clearly acknowledged, not only in *Western Airlines* and *Eshleman* but also in *Southern California Edison v. R.R.*

Commission, 6 C.2d 737, 748-749 (1936), a case cited by defendants.

The fact is that most regulatory agencies, including the PUC and the ICC, are a kind of fourth branch of government performing functions some of which are judicial in nature, some legislative in nature, and some even executive in nature. Regardless of the label applied, however, the commissions in the exercise of their certificating function act in a judicial capacity—they apply a legal standard to the facts of a specific case to resolve individual cases between private parties over private business rights. Judge Friendly, in his article entitled "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 Harv.L.Rev. 863 (1962) illustrates this distinction by comparing an agency's industry-wide rule-making role with its role in determining who should be granted a broadcast license, or by analogy, a certificate of public convenience and necessity.

> "Unlike the short sale rules, such [licensing] decisions involve not a prescription for the whole or even a segment of an industry but *the application of a standard to a concrete case requiring not only the determination of the standard but also the accurate ascertainment and proper weighing of scores of subsidiary facts* and, in the first example, the consideration of a vast complex of relationships. From a practical standpoint, therefore, it may be slightly misleading to characterize true administrative adjudication as 'delegation' by the legislature; a body cannot 'delegate' in any meaningful sense the performance of action it would be incapable of taking on its own even if it had the time and desire". (75 Harv.L.Rev. at 871; emphasis added.)

Judge Friendly explains this matter further:

> "It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*" (75 Harv. L. Rev. at 874; emphasis added.)

Defendants contend that certification proceedings are adjudicatory in form only—emulating the procedures of courts while engaging in a legislative process. But, as this Court has recognized, it is precisely because the Commissions are adjudicating individual cases that the procedures of courts are respected. *Hanna v. Larche,* 363 U.S. 420 (1960); *Greene v. McElroy,* 360 U.S. 474 (1959); cf. *Jenkins v. McKeithen,* 395 U.S. 411 (1969). See also *Wisconsin v. Constantineau,* ..... U.S. ....., 27 L.Ed2d 515 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

In *Hanna, supra,* the issue was whether the line between investigation and adjudication had been crossed so as to require that the respondents be accorded the right to confront and cross-examine witnessess against them in hearings before the Civil Rights Commission. In holding that this line had not been reached, this Court distinguished the due process requirements for each type of proceeding.

> "Thus, *when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals,* it is imperative that

those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." (363 U.S. at 442; emphasis added.)

The Court distinguished *Greene v. McElroy, supra,* a case involving the denial of a security clearance without an opportunity to confront and cross-examine persons who accused the petitioner of disloyalty, as follows:

"[f]inally, our decision last year in *Greene v. McElroy* lends little support to the respondents' position. *The governmental action there reviewed was certainly of a judicial nature.* The various Security Clearance Boards involved in *Greene* were not conducting an investigation; *they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment.* By contrast, the Civil Rights Commission does not make any binding orders or issue 'clearances' or 'licenses' having legal effect. Rather it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action de novo." (363 U.S. 452 emphasis added.)

The similarity between *Greene* and the present case is obvious. Neither the applicant for a security clearance nor for a certificate has a "right" to obtain it. Both are granted only where the applicant qualifies under the prevailing standard. In both cases, the standard applied is very broad, "national security" in one, "public conveni-

ence and necessity" in the other. In the application of either standard the decision-maker has broad discretion. Only the abuse of this discretion will cause the reversal of a decision in any given case. Both clearances and certificates are prerequisites to access to particular occupations—a license. The granting or denial of either will directly affect the applicant—and "have a significant impact on his employment." Both fundamentally involve the public interest. The process for obtaining either is adjudicatory, *not* just in procedure but in substance.

1. Adjudication is the Application of a Legal Standard to a Concrete Case. The Breadth of the Standard and the Existence of Sound Discretion in its Application Does Not Alter the Character of the Process

That the standard "public convenience and necessity" does not "connote an absolute" (Petitioners' Brief at 30) is completely true and yet totally misleading. While the determination in any given case is not automatic, the accumulation of experience, expertise and precedents gives these terms substantial meaning and permits an applicant to predict, with greater or lesser certainty, the probable disposition of his application. This fact was recognized by the Court in *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945):

> "Public convenience and necessity is not defined by the statute [Interstate Commerce Act]. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been

> employed for similar purposes for railroads in the same act since the Transportation Act of 1920 . . . Such use indicated a continuation of the administrative and judicial interpretation of the language . . ."

In 1948, the California Public Utilities Commission promulgated a liberal interpretation of public convenience and necessity which focused on the qualifications of the applicant and dictated the granting of certificates unless the applicant was unqualified or the entry of a new competitor would threaten the economic stability of the industry. *Investigation of Carriers of Property,* 48 Cal. PUC 62 (1948), supplemented by 48 Cal. PUC 587 (1949). The motivation for the policy was to bring carriers operating under non-common carrier permits within the ambit of more effective regulation. Entry into the field was to be liberalized so that the Commisson could regulate service, safety and rates. *Re Staple Truck Lines,* 52 Cal. PUC 352, 353 (1953). The Commission, in *Investigation of Regulation of Carriers of Property,* 53 Cal. PUC 366 (1954), merely restricted the right of applicants to use evidence of prior, unlawful service to demonstrate the existence of demand for the service proposed. Future applicants would still be required to show they possessed satisfactory financial resources, facilities, personnel, equipment and experience to provide and maintain a highway common carrier service.

The rationale behind the policy of competition was well stated in *Re Hills Transportation Co.,* 58 Cal. PUC 785 at 788-89 (1961):

> "Transportation does not flourish best as a regulated monopoly. Historically, it always has been a highly

> competitive undertaking . . . The pattern of transportation regulation has been 'regulated competition' . . . Competition, to the extent it does not impair the economic stability of the transportation industry, is desirable in the field of highway common carriage."

The policy applied to applications for extension of operating authority is equally liberal, *Re M and M Transfer Co.*, 67 Cal. PUC 238 (1967). The PUC policy with respect to the transfer of certificates is even more lenient, requiring only that the transfer not be "adverse to the public interest"; *Re Todd Freight Lines, Inc.*, 63 Cal. PUC 723 (1964); *Re Frank Nolan Drayage Co.*, 61 Cal. PUC 160 (1963).

Granting that no member of the regulated industry has a right to the continuation of a liberal policy and that the commissions have the power, and indeed the duty, to modify their policy in the face of fundamental changes does not affect this case. The complaint alleges that this policy did *not* change—that it continued to and through the date of filing. The only right that an applicant has is to have his application judged by the policy then in force, whether it is "liberal" or "restrictive." The Ninth Circuit recognized *this* right. The defendants acted to defeat it, by making access to the commission inordinately burdensome, not to change the prevailing policy.

That the standard "public convenience and necessity" is general does not render its application a legislative function. Quite to the contrary, the application of such broad standards are common in the adjudicatory experience: "Due Process", "fair, just and equitable", "may be to substantially lessen competition, or to tend to create a

monopoly" (§7 of the Clayton Act, 15 U.S.C. §18), "unreasonable restraint of trade". This Court has recognized the fundamentally judicial nature of such standards. In *United States v. First City National Bank,* 386 U.S. 361 (1967) the Court was faced with a challenge to its ability to apply "the convenience and needs of the community to be served" test to a bank merger approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1966 (12 U.S.C. §1828(c)). The Court had no difficulty with the challenge, finding the test essentially judicial in nature.

> "This conclusion does not raise serious constitutional questions by making the courts perform nonjudicial tasks. The 'rule of reason', long prevalent in the antitrust field . . . has been administered by the courts. A determination of the effect on competition within §7 of the Clayton Act is a familiar judicial task . . . If the anti-competitive effect is adverse, then it is to be excused only if 'the convenience and needs of the community to be served' *clearly* outweigh it. We see no problems in bringing these standards into the area of judicial competence. There are no constitutional problems here not present in the 'rule of reason' cases." (386 U.S. at 369-70, emphasis in the original.)

The existence of discretion in the application of a legal standard to a particular case is also commonplace in the adjudicatory experience. For example, decisions on petitions for injunctions by a court of equity, the grant or denial of motions to amend pleadings, to dismiss a complaint, for summary judgment, etc. are within the sound discretion of the Court. The discretion of the commis-

sions in granting or denying applications for certificates is also limited to "sound discretion". As this Court said in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957):

> "Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service . . . But that discretion must be exercised in conformity with the declared policies of the Congress. [e.g. the National Transportation Policy] To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

Again, in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), this Court declared that

> "[t]he Commission must exercise its discretion under §207(a) within the bounds expressed by the standard of 'public convenience and necessity' . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence." (371 U.S. at 167-68; emphasis in the original.)

The cases cited by the defendants on the issue of discretion show nothing more than that the commissions are the triers of fact in the first instance and that judicial review of their decisions is limited by the "substantial evidence" rule. The PUC and the ICC apply their expertise to the evidence submitted by the parties in a certification proceeding and then determine whether the proposed service is consistent with the public convenience and necessity as defined by earlier decisions and present conditions in the transportation industry. Judicial review of this determination is limited. If the decision is supported by findings of fact and the findings by substantial evidence the commission's action will be sustained. The reviewing court will not sift and weigh the evidence de novo. The same is true of facts found by juries in traditional trial courts. This does not transform either the commissions or juries into legislative bodies.

E. Application of the Sherman Act Will Not Impair the Flow of Information to the Commissions and Courts

Defendants argue that, by limiting the application of *Noerr-Pennington* to "public officials" who serve in a representative capacity, the Ninth Circuit has thereby made the Sherman Act applicable to all combinations which use the adjudicatory functions of government. This is clearly a distorted view of the Ninth Circuit opinion. Access to adjudicatory bodies is protected from the Sherman Act and other restrictive laws where it is used in a procedurally and substantively proper manner, without abuse and in an "atmosphere consistent with effective performance of" its functions. (Jt. App. 52 n. 6.) The Ninth Circuit clearly stated the values to be protected

in adjudicatory proceedings. Under its opinion, access to these bodies is free and unrestricted so long as it is not used for unlawful purposes. The opinion calls attention to the differences between information relevant to the proper functioning of an adjudicatory forum and that relevant to the proper functioning of political forums, as well as the differences in channels and means through which information is provided by citizens and received by government in the two contexts. This Court in *Noerr* did not deal with the values to be protected in adjudicatory proceedings because that issue was not before the Court as it was in *Singer* and *Walker Process.* Defendants' position that the rules of rough and tumble politics should be applicable in adjudicatory proceedings is totally without merit. The Ninth Circuit opinion merely dictates that adjudicatory processes may not be used by a combination to restrain trade. It, in effect, holds that opportunities for furnishing information in a legitimate manner exist and must be used. The Ninth Circuit merely denied defendants a license to engage in destructive, anticompetitive use of indiscriminate protests under the pretense that needed information could not otherwise reach government.

Defendants have argued their case as if there were no underlying agreement among defendants to use blanket protests to foreclose competitors' access, thereby drying up a valuable source of information. They argue as if each protest filed was a well considered attempt on their part to provide information. The Ninth Circuit recognized the error of this argument by correctly accepting, as true, the allegations of the complaint, that defendants'

plan was to prevent all information from reaching the agencies and courts.

Regardless of what defendants say, a finder of fact could justifiably conclude, from the details of the defendants' plan to protest each and every application, that they sought to prevent the functioning of the process by which information reached the commissions and courts.

Defendants argue that as "trustees of the public interest", they not only have the right but the duty to protest. Whatever the merits of that statement generally, and we seriously question it has any merit, it surely cannot apply to this case. For it is a travesty to say that "trustees" who deliberately plan a program of litigation calculated to deter competitors engaged in the same business, may with impunity foreclose those competitors from supplying and the agencies from receiving information by clogging and obstructing the flow of information. Defendants' argument comes down to this: because some information is incidentally provided by their protests, any group having information must be permitted to present it and the government must receive it even though the group's sole purpose is to frustrate, for anticompetitive ends, the effective functioning of the process in which the information provided is relevant.

Defendants make this argument in a context where many other avenues of communication, which would be within the protection of *Noerr,* were open to them. Defendants could have lobbied the legislature or the commissions in rule and policy-making proceedings; they could have participated in certification proceedings either by filing joint *amici* briefs or test cases. All of these

methods would have permitted defendants to make their position known to the commissions without imposing unreasonable burdens on the commissions or applicants. But, the purpose of defendants' activities was not to communicate information or induce a change in policy, but to deter the filing of applications. Only relentless, implacable opposition would produce the desired result.

Defendants contends that the allegations in the complaint that defendants protested each and every application "with or without probable cause, and regardless of the merits" (Jt. App. 7) mean only that

> "defendants did not try to make their own private determinations of whether public convenience and necessity justified the certificating in question; on the contrary, they consistently volunteered whatever evidence and opinion in opposition to additional certification they could produce, leaving to the agency the ultimate determination." (Petitioners' Brief p. 47.)

Defendants are too generous. What these allegations mean is that even if defendants knew to a certainty that the public convenience and necessity imperatively demanded the granting of an application and that their protest was completely groundless, they would protest—at the commission level and through every appellate level available to them. It was attrition—not agency action—which they sought.

Not only did the defendants have alternative means for communicating with the commissions, these agencies also have alternative sources of information. Regulatory agencies develop substantial bodies of expertise regarding their regulated industry. They also maintain staffs

of transportation experts and investigators in daily contact with the industry. In addition to day-to-day monitoring, the commissions have the authority to initiate industrywide rule-making or investigatory proceedings to examine, in detail, any facet of the industry. Information supplied by applicants for certificates must be verified. In view of the expertise of the agencies, they are not completely dependent upon the parties in any given proceeding.

For all the reasons stated above in this section, restrictions on the right of defendants to overload the channels of information by blanket protests are justified and will not impair communication between the industry and the commissions. The effect of applying the Sherman Act to defendants' conspiracy will be to reopen the certification procedures to the industry and to revitalize the flow of information to the commissions and courts.

III. THE CONDUCT OF THE DEFENDANTS IS NOT PROTECTED BY THE FIRST AMENDMENT

Recognizing the pre-eminent position the First Amendment justifiably has in our constitutional system, plaintiffs respectfully submit that it has no application in this case. The holding of *Noerr* rested upon a construction of the Sherman Act—not on the First Amendment.[15]

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[15]Footnote 6 of the *Noerr* decision makes this clear:
"The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment. . . . Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses." (365 U.S. at 132.)

It is clear, however, that had the Court found the defendants' activities to be within the reach of the Sherman Act, the constitutional issue would have been dealt with. As demonstrated above, neither of the other reasons for the *Noerr* decision, "essential dissimilarity" nor "substantial impairment" of representative government officials' ability to represent their constituents' wishes, is applicable to this case. Therefore, we discuss the constitutional issue.

The First Amendment does not protect the activities of defendants for two reasons. First, the right to petition is not an absolute right. The scope and limitations of that right are different in adjudicatory bodies[16] than in the legislative and executive branches of government. Second, the right is available only to parties who genuinely seek to influence governmental action. Defendants do not occupy either of the protected positions.

The First Amendment provides that:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

These rights are cognate and inseparable, *Thomas v. Collins,* 323 U.S. 516 (1945), but they are not absolute, and the degree of protection varies depending upon the context in which they are exercised. They are limited

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[16]See *Melvin v. Pence,* 130 F.2d 423 (D.C. Cir. 1942) where access to administrative adjudicative proceedings was limited where a protestant misused the processes of the agency. The Court held there was no difference between limitations on use of judicial proceedings in agencies and in courts. (130 F.2d 426-427.) See also *National Surety Co. v. Page,* 58 F.2d 145 (4th Cir. 1932).

and correlative and reasonable restrictions upon their exercise are permissible. *Citizens Publishing Co. v. United States,* 394 U.S. 131 (1969); *Adderley v. Florida,* 385 U.S. 39 (1966); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949); *Associated Press v. United States,* 326 U.S. 1 (1945). One cannot exercise his First Amendment rights so as to deprive others of theirs. In *Citizens Publishing Co. v. United States,* supra, this Court, in response to arguments that the defendant newspapers' combination in restraint of trade was immunized from the Sherman Act by the First Amendment, stated:

> "[t]he restraints imposed by these private arrangements have no support from the First Amendment as Associated Press v. United States, 326 U.S. 1, . . . teaches. . . . As we stated in the Associated Press case:
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> 'It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests . . .' 326 U.S. at 20. . . ." (394 U.S. at 139.)

Similar limitations were imposed on the guaranty of freedom of speech in *Giboney v. Empire Storage & Ice Co., supra.* In *Giboney,* an ice peddlers' union attempted to induce ice wholesalers to refuse to deal with non-union peddlers. Such an agreement was violative of a state statute prohibiting combinations in restraint of trade. When Empire refused to submit to the union's demands the union resorted to peaceful picketing. Empire obtained an injunction against the picketing and the union appealed on the ground that the injunction infringed upon its right to freedom of speech. The Court unanimously rejected this contention:

> "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." 336 U.S. at 498.
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> "It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgment of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U.S. at 502.
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> * * *
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> "Appellants' power with that of their allies was irresistible. And it is clear that appellants were

> doing more than exercising a right of free speech or press . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." 336 U.S. at 503.

The First Amendment rights of assembly and petition deserve no greater protection than the rights of speech and press. See *Adderley v. Florida,* 385 U.S. 39 (1966). That the right to petition extends to the judicial branch of government is clear. *United Transportation Union v. State Bar of Michigan,* ..... U.S. ....., 28 L.Ed.2d 339 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). However, where a petition is addressed to adjudicatory bodies, the petitioner's purpose and intent are pivotal factors in determining whether the petition is protected or not. The right to petition courts, like the rights of speech and of the press, must give way when private persons make wrongful efforts to corrupt or subvert judicial action. *Cox v. Louisiana,* 379 U.S. 559 (1965). *Shelley v. Kraemer,* 334 U.S. 1, at 22 (1948); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941). In *Sheppard v. Maxwell,* 384 U.S. 332 (1966), this Court held that the constitutional right of free speech could not be used to subvert the judicial process or obstruct its administration:

> "[b]ut, the Court has also pointed out that 'legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.'

Bridges v. California, supra, 314 U.S. at 271, 86 L.Ed. at 207, 159 ALR 1346.

* * *

"'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' *Pennekamp v. Florida*, 328 U.S. 331, 347. . . . But, it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures'." (384 U.S. at 350-51.)

See also, *Illinois v. Allen*, 397 U.S. 337 (1970); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

Defendants contend that their activities are protected from Sherman Act liability by *NAACP v. Button*, 371 U.S. 415 (1963). Their reliance on *Button* is misplaced. *Button* involved the application of Virginia's recently amended barratry statute to a program conducted by the NAACP, as part of its campaign to eradicate racial segregation in public schools, wherein the NAACP solicited potential plaintiffs, both members and non-members, and urged them to retain the NAACP legal staff to represent them in the vindication of their constitutional rights. The NAACP was to bear all litigation expenses. The highest state court held that the NAACP's activities constituted improper solicitation of legal business. This Court interpreted that decree "as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." 371 U.S. at 433. As so construed the statute trenched upon the First and Fourteenth Amendments because it unduly

inhibited "protected freedoms of speech and association". Id. at 437.

Four reasons were present in *Button* which justified holding that the activities of the NAACP were protected. First, the association seeking to use judicial processes did so for what were clearly found to be means of *political* expression.[17] Second, litigation, of the type sponsored by the NAACP, was the sole practicable avenue open to the Negro minority to petition for redress of grievances. 371 U.S. at 430. Third, the NAACP, in advocating litigation, acted with lawful intent and purpose and to achieve a legitimate objective, the vindication of the constitutional rights of a minority to equal protection of the law and to end to unlawful racial segregation in public schools. Fourth, resort to the courts by the NAACP was not to use the process oppressively or avariciously for purely private gain. The Court distinguished such a lawful objective from those types of solicitation traditionally condemned as follows:

> "[m]alicious intent was of the essence of the common law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through

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[17]"In the context of NAACP objectives, litigation is not a technique for resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today." (371 U.S. at 429-30, footnotes omitted.)

> litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest. Hostility still exists to stirring up private litigation where it promotes the use of legal machinery to oppress: As, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly, or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public." (371 U.S. at 439-41; all footnotes omitted.)

The Court concluded that:

> "[r]esort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." 371 U.S. at 433.

Each of the three cases following *Button* on the issue of association for litigational purposes, *United Transportation Union v. Michigan*, ... U.S. ....., 28 L.Ed.2d 339, 91 S.Ct. ..... (1971); *United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967) and *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), involved the extent to which the unions could assist their members in asserting their rights under federal and

state workmen's compensation statutes. While this Court extended the reasoning of *Button* to solicitation of litigation which was not directed at political objectives (389 U.S. 217, 223) it consistently emphasized the lawful purposes and objectives of the unions in each case.

The present case is totally different. Defendants claim that their activity was *political* and, therefore, within the protection of *Button*. The reasoning behind this contention is that (1) defendants sought to influence governmental determinations in certification proceedings; (2) no one has a "right" to certification; (3) the granting of certificates is based upon public convenience and necessity which necessarily equals "public interest"; (4) the public interest is a political concept; (5) therefore, defendants' activities were political. The defects of this syllogism are patent.

Premise No. 1 above is irrelevant to this case. The complaint alleges that the defendants merely used the forms of the judicial process and sought to clog the adjudicatory machinery to prevent it from functioning. As to premise No. 2, the "right"-"privilege" dichotomy has no constitutional significance. *Speiser v. Randall,* 357 U.S. 513 (1958). While no applicant has a "right" to have his application granted, every applicant has a "right" to have his application judged by the prevailing standard of law on the issue of public convenience and necessity. Defendants acted to frustrate this right and to prevent the commissions and courts from applying this standard.

Defendants' Third, Fourth and Fifth points are also without merit. Every rule of law is a manifestation of the

"public interest," a statutory or judicial compromise between conflicting policies, designed to contribute to the general welfare. In the commissions, as in the courts, when the balance between these conflicting policies shifts, a new rule of law reflecting this shift, is announced. Thus, all litigation, to one degree or another, involves and affects the public interest. This does not make litigation *political*. Litigation, whether it concerns certificates of public convenience and necessity, patents, workmen's compensation, personal injuries or property damages, is nonetheless litigation involving judicial processes between private parties. Litigation is conducted on a case or controversy method of resolving private disputes even where broad policy questions affecting others than the litigants are involved. If competitors choose the judicial or administrative adjudicative bodies to achieve anticompetitive purposes, then they must seek action through the rulings of such forums and not by use of their processes directly against competitors.

Defendants had numerous alternatives available to either change commission policy with respect to certification, in general, or to influence the determination in a given case without creating and perpetuating a plan designed to impinge upon the access of others to the bodies capable of granting business licenses. Such was not the case in either *Button* or the union cases.

In *Button* and the union cases, the NAACP and the unions acted for legitimate and lawful, indeed laudable, purposes. In the present case the defendants acted to restrain trade, to prevent the filing or prosecution of applications for certificates and to obstruct the machinery of

the commissions designed to control and direct the development of the transportation industry. Defendants seek to evade this critical distinction by characterizing the above purposes as "motivation" while contending that their "objective" was to persuade "the ICC, the PUC and the courts to draw certain conclusions in the public interest." (Petitioners' Brief p. 54.) This contention merely raises a fundamental question of fact calling for a trial on the merits for its resolution. The complaint alleges that the defendants acted to create a direct restraint upon competitors by deliberately initiating processes which worked directly on such competitors to deter and discourage access to the agencies which controlled the granting and extension of business rights. The success of this program depended on defendants' activity—not the determinations of the respective commissions or the courts. Defendants acted not to persuade the commissions but to dissuade their competitors. This is an unlawful objective and subjects the defendants to liability under the Sherman Act.

A. In Balancing Defendants' First Amendment Rights Against the Application of the Sherman Act to the Abusive Conduct of Defendants in the Employment of Procedural Machinery, The Sherman Act Should Apply

If defendants have any First Amendment right to use judicial and administrative adjudicatory procedures as a mechanism to restrain trade, the facts of the present case require that it be subordinated and the Sherman Act applied to defendants' conspiracy.

In striking the balance, the following factors should be weighed in favor of defendants' point of view: (a) the

First Amendment right to assemble and petition, (b) the right of citizens to inform government permitting it to function better when information is provided to it by interested citizens at no cost to government. The other side of the scale should be weighted as follows: (1) the right of the regulatory agency, subject to court review, to control market entry and expansion in accordance with its views of the desirability of competition, (2) the strong public interest in the enforcement of antitrust policy in the trucking industry where such industry is not exempt from Sherman Act application and where that policy does not irreconcilably collide with the regulatory scheme, (3) the value in preventing use of adjudicatory processes for purposes other than those for which they are designed, and thus maintaining their ability to resolve individual cases on the merits, and (4) the value in keeping adjudicatory bodies open and accessible, free from artificial obstructions to the flow of information.

The policies behind the antitrust laws of the United States were eloquently stated by Mr. Justice Black in *Northern Pacific R. Co. v. United States*, 366 U.S. 1, 4 (1958):

> "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

To effectuate these policies the Sherman Act has been interpreted to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945), and to condemn all combinations which unreasonably restrain trade. *United States v. Line Material Co.*, 333 U.S. 287, 309-310 (1948). The defendants have created an unreasonable restraint of trade which violates the Sherman Act.

By deterring applicants from filing applications, the defendants took away from the commissions the opportunity to apply their prevailing transportation policy and thereby shape the growth of the trucking industry. Defendants also prevented much information, normally provided to the commissions by applicants, from being communicated to the commissions. The commissions and the public interest, as well as the plaintiffs, were injured by defendants' conspiracy. The interference by defendants with these important state interests weighs heavily in favor of application of the Sherman Act.

It is true, as defendants point out, that this case does not arise in a context of "free" competition. The pattern of transportation regulation has been "regulated competition." *In Re Santa Fe Transportation Co.*, 41 Cal. RC 239 (1938); *In Re Hills Transportation Co.*, 58 Cal. PUC 785, 788-89 (1961). As was said in the *Hills* case "Competition, to the extent that it does not impair the economic stability of the transportation industry, is desirable in the field of highway common carriage." The present case presents the issue: who is to decide which degree of competition is desirable—the defendants or the commis-

sions vested with this responsibility by Congress and the California legislature.

Judicial processes of the courts and commissions are designed to produce the just resolution of individual cases on their merits as expeditiously and economically as possible. Toward this end, the forums must presume that parties appearing before them participate in good faith with the aim of vindicating their point of view in the proceedings. This presumption is justified by human experience and required by sound administration. Where, however, parties initiate adversary proceedings, not for the purpose of prevailing on the merits but rather to use the judicial procedures, themselves, directly to injure their adversaries, an inexcusable burden is placed on the forum and the effective discharge of its mandate is prevented. Where a party or a combination of parties can so use the judicial process with impunity, respect for courts and administrative adjudicative bodies as impartial forums is impossible to maintain. As discussed below, the administrative agencies are incapable of controlling such a conspiracy on a case-by-case basis and, therefore, incapable of protecting themselves from such abuse. Where this abuse is designed to restrain trade and destroy competition, the Sherman Act is the appropriate sanction.

Accordingly, the proper test should be as follows:

> Where it can be shown that a group of competitiors combine and conspire to use, regardless of the merits of their case, the judicial *processes* and *procedures to* unreasonably restrain trade, rather than seeking such restraint through governmental action, a violation of the Sherman Act exists.

This test is applied in the Ninth Circuit opinion.

B. Application of the Sherman Act in This Case Cannot Create a Chilling Effect

Defendants contend that the Ninth Circuit's standard is too vague, ambiguous and uncertain. The result of such a test, according to defendants, is to create a "chilling effect" which renders the Sherman Act unconstitutional. The test, as do so many tests in the law, depends upon a finding of a requisite intent or state of mind. The existence vel non of this mental state will be shown by evidence. In *Singer* the Court confirmed this most elementary of legal concepts.

> "Whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." (374 U.S. at 195).

Mere theoretical difficulty in "sorting out" in a businessman's "own mind" what is right or wrong cannot determine this case. In this case defendants are no more than "hard core" violators of the Sherman Act and should not be permitted to shelter themselves by asserting fancied difficulties a businessman acting in good faith might be confronted with. *Adderley v. Florida, supra,* cf. *Brown v. Louisiana,* 383 U.S. 131 (1966) (concurring opinion of Mr. Justice Brennan).

The proposed test is as definite and certain as the "actual malice" test enunciated by this Court in protecting the First Amendment rights of freedom of speech and of the press in the context of the common law torts of defamation and invasion of privacy. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Time, Inc. v. Hill,* 385 U.S. 374. The existence of this "actual malice"—conscious knowledge of falsity or reckless disregard of the truth

or falsity of a statement—is a question of fact to be determined by the jury upon proper instructions. *Time, Inc. v. Hill,* 383 U.S. at 393-394 n.11 and accompanying text. If supported by substantial evidence the jury's findings will be sustained on appeal. So also in the present case, if a jury should find, based upon substantial evidence, that defendants intended to use the procedures, rather than the determinations, of adjudicatory bodies to restrain trade, liability under the Sherman Act should result.

Furthermore, even if some restraint on defendants' freedom of action were to result this should not bar the application of the Sherman Act to the defendants' conspiracy. As Mr. Justice Black, speaking for the Court, stated in *Younger v. Harris,* 401 U.S. 37 (1971):

> "[m]oreover, the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." (401 U.S. 37, 27 L.Ed.2d 669, at 679-80).

As the following section will demonstrate, the PUC and ICC are incapable of protecting themselves from the type of abuse employed by the defendants. An independent action for such abuse is necessary and under the facts of this case, the Sherman Act is the proper source for that action.

IV. A CONSPIRACY SUCH AS THAT ALLEGED IN THIS CASE IS BEYOND THE COMPETENCY AND EXPERTISE OF THE ICC AND PUC

The arguments made by defendants regarding the "extensive regulatory supervision" of the PUC and ICC (Petioners' Brief at 67-72) are not properly before this Court. These are exclusive jurisdiction arguments which the lower courts expressly declined to decide. (See letter of Judge Sweigert to Michael N. Khourie dated October 25, 1967; Jt. App. at 44.) Plaintiffs will demonstrate that these arguments are false.

First, if defendants have a First Amendment right to utilize the procedures of administrative adjudication to restrain trade which protects them from liability under the Sherman Act, that right would similarly immunize them from and invalidate any rules or regulations promulgated by the commissions which would proscribe the use of procedures to restrain trade or to defeat the power of the commissions to regulate. Defendants lay great stress in their brief on the fact that commission rules on standing authorize their participation in certificate proceedings. But, if the defendants have a First Amendment right to use adjudicatory process in any manner and for any purpose they choose a commission rule which limited or denied defendants standing would infringe their alleged First Amendment right and, therefore be unconstitutional. The same alleged defects of vagueness and "chilling effect" would arise from a commission rule as defendants contend exist if the Sherman Act is applied to this case.

Second, assume that the PUC and ICC promulgate a rule which prohibits participation by combinations of competitors which intend to use the procedures surround-

ing the certification process as the method or means to restrain trade. To enforce such a rule the commissions would be required to hold a preliminary hearing in each certification proceeding, to examine in detail the motives and purposes of the combined certificate holders, their relationships to one another and to the applicant before the issue of standing could be determined. If standing to participate were denied this would constitute a final order by the commissions subject to judicial review in the courts. Only after the appellate review could the merits of the application be reached.

The results of such a hypothetical rule and its enforcement by the commissions are to divert the commissions from their area of special expertise, which is to determine the public convenience and necessity. Such a rule would require examination into complex and difficult questions of fact, intent, purpose, etc. more appropriate to traditional judicial forums. It would delay reaching the merits of the application and permit the defendants to accomplish their anticompetitive purposes.

Finally, no regulated industry is exempt from the Sherman Act by reason of the fact that it is regulated. This is true regardless of the pervasiveness of the regulatory scheme involved. Exemptions from the Sherman Act are created by Congress through express exemption or declared by this Court by reason of "repeal by implication" which is strongly disfavored and is only found in cases of plain repugnancy between antitrust law and the regulatory scheme. *United States v. Philadelphia National Bank,* 374 U.S. 321, 350 (1963) (Bank Merger Act of 1960, Comptroller of the Currency); *United States*

v. First City National Bank, 386 U.S. 361 (1967) (Bank Merger Act of 1966, Comptroller of the Currency); *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) (Security Exchange Act of 1934 and Security Exchange Commission); *California v. Federal Power Commission,* 369 U.S. 482 (1962) (Natural Gas Act and FPC); *United States v. Radio Corporation of America,* 358 U.S. 334 (1959) (Federal Communication Commission); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945) (ICC).

This Court has also declared that valid action by a state, *Parker v. Brown, supra,* or by the federal government, *U. S. v. Rock Royal Cooperative, supra,* is exempt. In *Noerr* and *Pennington,* this Court declared political activities genuinely seeking government action to be exempt. These exemptions and immunities do not exist by virtue of the "rule of reason" enunciated in *U.S. v. Standard Oil,* 221 U.S. 1 (1911), nor by the "existence of extensive regulatory supervision" as defendants argue (Petitioners' Brief pp. 67-72). The rule of reason protects from liability under the Sherman Act reasonable restraints of trade and has nothing to do with whether or not a business is regulated. The complaint alleges that defendants acted unreasonably. There is no reason to believe that the degree of regulation over them has somehow rendered their behavior reasonable. Despite this, defendants argue that this strange transformation has occurred. They cite not one shred of authority to support this proposition.

V. SUMMARY OF SELECTED LOWER COURT DECISIONS

From the following review of lower court opinions applying the *Noerr-Pennington* doctrine to diverse factual situations, it is apparent that the present case is essentially different from all prior cases in which the issue has been raised. In the present case the defendants are accused of using the forms of petition rather than its substance to restrain trade. Defendants attempted to influence governmental action only to the extent necessary to make the use of *procedures* an effective restraint.

In the cases summarized below, it is clear that the defendants genuinely and actively sought to induce governmental action which would injure their competitors. Many of the resulting restraints arose from the decisions of governmental agencies or officials. In the present case it was the joint activity of the defendants, not governmental action, which restrained trade and destroyed competition.

A. Cases Holding Noerr-Pennington Applicable

1. Association of Western Railroads v. Riss, 299 F.2d 133 (D.C. Cir. 1962):

The defendants, many of whom were also defendants in *Noerr*, were charged with conspiring to suppress competition through many of the same activities alleged in *Noerr*, none of which consisted of a conspiracy to restrain trade through the use of adjudicatory processes.[18] The only allegation which was even remotely similar to those

[18]The acts alleged were a public relations campaign directed at the plaintiff, lobbying and solicitation of state and city officials to enact laws, ordinances and regulations injurious to the plaintiff's interests, and similar activities. (See 170 F.Supp. 354, 357-358.)

in the present case was that the defendants' public relations campaign induced private citizens to register complaints against the plaintiff in ICC proceedings. The Court of Appeals noted that the *Noerr* case was decided four months after the district court opinion in *Riss*, and that the *Riss* district court had expressly relied upon the lower court opinions in *Noerr* for its jury instructions. Because so much of the *Riss* defendants' activities were directed at the enactment and enforcement of laws and, therefore, within the *Noerr* exemption, the jury instructions were erroneous and required reversal "irrespective of any other evidence in the present case." (299 F.2d at 135.) The court did not, contrary to the assertion made in Petitioners' Brief at p. 73, discuss the propriety of any particular conduct of the defendants in *Riss*. It merely held that since most of the evidence concerned activities within *Noerr* protection, the decision had to be reversed.

2. Baltimore & O. Ry. Co. v. New York, N.H. & H. Ry. Co., 196 F. Supp. 724 (S.D.N.Y. 1961):

In an action to recover money due under a freight car rental agreement, the defendant railroads counterclaimed alleging that the plaintiffs had violated the antitrust laws by (1) participating in an industrywide rate-making proceeding before the ICC, which culminated in ICC approval of rates higher than those defendants believed to be reasonable; and (2) by then bringing a declaratory judgment action against the defendants to have the approved rates declared "just, reasonable and otherwise lawful." (196 F. Supp. at 745.) At the end of a lengthy opinion in which the court had discussed a number of grounds indicating nonliability, there is a one-line reference to the

counterdefendants' propaganda efforts directed at the ICC and a Senate committee and the institution of court proceedings to enforce the rates. Without any discussion or analysis of the *Noerr* opinion, the district court implied that the two courses of conduct were indistinguishable under *Noerr*. With respect to the propagandizing activities, the court was correct—such activity is representative of the political activity *Noerr* sought to protect. With respect to the judicial activity alleged, the court was clearly wrong as the patent-antitrust cases indicate. The case is further distinguishable due to the absence of allegations that the counterdefendant railroads were using the judicial process to harass or directly restrain the counterclaimants. Any restraint would have been produced by the decision on the merits, not the mere use of the procedures of litigation. The counterdefendants were genuinely seeking to influence governmental action.

3. Schenley Industries, Inc., v. New Jersey Wine & Spirit Wholesalers Assoc., 272 F.Supp. 872 (D.N.J. 1967):

The plaintiff alleged that the defendants used improper influence on the state alcoholic beverage commission to induce favorable decisions and also that they lobbied for the passage of laws which prevented the plaintiff from entering the wholesale market. In both situations the defendants were lobbying legislative and executive bodies seeking to induce the passage and enforcement of laws. The genuineness of the defendants' efforts was conceded by the complaint. (See 272 F.Supp. at 884 n. 20.) Any resulting restraint was produced by governmental action coming within the *Parker v. Brown* "state action" exemption. There were no allegations that the adjudicative

process or proceedings were used by defendants to directly injure the plaintiff.

4. Bracken's Shopping Center, Inc. v. Ruwe, 273 F.Supp. 606 (S.D. Ill. 1967):

The defendants, downtown merchants, filed a representative suit in the state court challenging the validity of an ordinance under which the city of Peoria, Illinois had vacated several streets to permit the construction of the plaintiff's shopping center. If the defendants in the case at bar had sued the California PUC seeking a declaratory judgment invalidating its liberal certification policy, the *Bracken* case might support their claims of nonliability.

Bracken is further distinguishable on several grounds. First, only one suit, rather than an unlimited program of suits, was involved. Even under orthodox antitrust application, this would probably not be an unreasonable restraint of trade. Second, the suit was filed to induce governmental action invalidating the ordinance—the defendants sought a decision on the merits—rather than seeking to injure the plaintiff directly by using the *process* of litigation. Third, in *Bracken* the defendants were conclusively shown to have probable cause for bringing suit. (273 F.Supp. at 608.) The defendants in the case at bar are alleged to have protested where probable cause for such protests was totally absent.

5. A.B.T. Sightseeing Tours, Inc. v. Gray Line N.Y. Tours Corp., 242 F.Supp. 365 (S.D.N.Y 1965):

The complaint charged defendants with "lobbying activities with legislative bodies and administrative agencies of the City of New York to enact and promulgate

laws and regulations designed to suppress and eliminate competition between defendant and its competitors, including the plaintiffs." (242 F.Supp. at 369-370.) Finding the alleged activity indistinguishable from that in *Noerr* and *Pennington*, the court properly granted the motion to strike. There were no allegations that the defendant had attempted to eliminate competition through litigation of any kind, much less through a scheme of indiscriminate litigation.

6 **United States v. Johns-Manville Corp., 259 F.Supp. 440 (E.D.Pa. 1966):**

The defendants and co-conspirators were charged with anticompetitive lobbying directed at influencing state and local government units to adopt specifications for pipe which would injure their competitors. The activities were clearly within *Noerr* protection. Any adverse effects to competition would only occur after the specifications were adopted by government.

7. **Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964):**

Combination to induce the state Attorney General to file suit against a savings and loan company forcing it into receivership. Since the suit was "state action" within *Parker v. Brown, supra*, Sherman Act liability could not be made to depend upon whether or not such state action was proper or lawful. No state action is challenged in the present case.

8. Central S&L Assoc. of Chariton, Iowa v. Federal Home Bank Board, 422 F.2d 504 (8th Cir. 1970):

Defendant, United Federal, applied to the Bank Board for authority to conduct business through mobile facilities in 12 communities. Authority was granted for three communities. Plaintiffs sued under the antitrust laws contending that the granting of such authority violated sections 1 and 2 of the Sherman Act. It is clear that *Parker v. Brown, supra,* covers this case, whatever the effect on competition if was a direct result of state action by the Bank Board. It is equally clear that the defendant was genuinely and honestly seeking to induce governmental action.

B. Cases holding Noerr-Pennington inapplicable.

1. Woods Exploration & Producing Co. Inc. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), petition for cert. filed, 39 U.S. L.W. 3528 (U.S. May 15, 1971) (No. 70-173, O.T. 1971):

Defendants were alleged to have filed false production forecasts (nominations) with the Railroad Commission in order to reduce the production quotas allowable to the plaintiffs, thereby curtailing production. It is clear that the defendants intended the Commission to rely on their false forecasts and that the Commission did so. However, the Circuit Court reasoned that the Commission relied implicitly on the truthfulness of the forecasts and made no independent judgment in reaching production allowables. Therefore, no state action within *Parker v. Brown, supra,* was present. It was defendants' conduct, not that of the Commission which injured the plaintiffs. In holding that the mere involvement of government should not serve to immunize predatory conduct the Court stated:

"[*t*]*he policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes.* Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and require the same result. In Trucking Unlimited v. California Motor Transport Co., 9 Cir. 1970, 432 F.2d 755, the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policy-making function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies. *Similarly, in the instant case,* there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rule-making proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anti-competitive purposes." (438 F.2d at 1296-97; emphasis added.)

2. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.) cert. denied, 400 U.S. 850 (1970):

Defendant was charged with having induced state and local purchasing agents to adopt swimming pool specifications which could only be filled by the defendant. The technique used to influence the governmental officials was a combination of intimidation, threats and harassment designed to undermine the state policy of competitive bidding. The Court held that even though the defendant genuinely sought to influence government its conduct was not of the type which *Noerr* or *Parker v. Brown* intended to protect. The indirect subversion of public policy should not be protected where direct means to change the policy are available.

> "The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding." (424 F.2d at 33.)

Similarly in the case at bar, there was a fixed policy respecting the granting of certificates by the PUC. Defendants, rather than attempting to change it by *Noerr*-protected lobbying, undermined and subverted this policy through indiscriminate protests of all applications filed.

3. **Sacramento Coca Cola Bottling Co., Inc. v. Chauffeurs Local 150, 440 F.2d 1096 (9th Cir. 1971):**

Defendants were alleged to have combined and conspired to cause state fair officials to issue a directive forbidding the sale of Coca Cola upon the fairgrounds. The defendants used intimidation, threats and other coercive measures to influence the governmental officials. The Court held that *Noerr-Pennington* was not designed to protect such conduct.

4. **United States v. Otter Tail Power Co., 1971 Trade Cases ¶ 73,692 (D. Minn. 1971):**

In *Otter Tail,* the defendant private power company attempted to frustrate various plans of cities to develop municipal power systems which would compete with the defendant by means of a program of litigation. The suits attacked the validity of the municipal bond issues designed to raise revenue to finance the municipal systems. As the District Court noted:

> "A 'no-litigation certificate,' reflecting the absence of litigation which might impair the salability of revenue bonds, is essential to a successful sale of municipal bonds. The pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system." (1971 Trade Cases at 90,891)

Thus, by the mere expedient of filing suit the defendant was able to at least delay and possibly defeat entirely the construction of competitive facilities. In the *Otter Tail* case as in the case at bar most of the litigation was carried to the highest available appellate level and filed

regardless of probable cause or the merits of the action. The defendant in *Otter Tail* was merely using the process of litigation to restrain trade:

> "the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the town's limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise. Hankinson, after several years of abortive effort, accepted this type of offer and renewed defendant's franchise." (Id.)

Relying on the Ninth Circuit opinion in the case at bar the Court concluded that

> "the *Noerr* principle is applicable only to efforts aimed at influencing the legislative and executive branches of the government. It only immunizes political activity directed toward the enactment and enforcement of the laws from antitrust attack. See *Woods Exploration & Producing Co. v. Aluminum Co. of America* [1971 TRADE CASES ¶ 73,422], 438 F. 2d 1286 (5th Cir. 1971), and *Trucking Unlimited v. California Motor Transport Co., supra. Noerr* does not free from antitrust sanctions the institution of court litigation.
>
> From all of the evidence it appears that defendant, by refusing to deal with municipalities and by conducting or sponsoring court litigation, has violated Section 2 of the Sherman Act and monopolized or attempted to monopolize the sale of electric power in its service area." (Id. at 90,891-892.)

No other conclusion is possible if the adjudicatory function and process is to be preserved.

CONCLUSION

Licensing is becoming increasingly a prerequisite to the entry of business at all levels of government. Licensing procedures vary from the simplest ministerial act to complex hearings conducted in the judicial model. Opportunities are inherent through the mere persistent employment of such procedure for established and powerful businesses in strong market positions, either alone or in combination, to prevent or make market entry difficult for competitors. The capacity of businesses to developing new methods of finding ways to dispel competition is limited only by the imagination of their managers, which history has proved to be almost limitless. The Sherman Act and the strong policy of competition has been virtually the only effective brake.

Because licensing necessarily involves government and since the *Noerr-Pennington* and the *Parker v. Brown* doctrines have granted certain areas of immunity from the Sherman Act, it is not surprising to find increasing anticompetitive activity in those areas. It should not be surprising that these doctrines are being stretched to their limits and beyond. We believe that businesses which thus seek to find refuge for their predatory conduct in these doctrines employing plans which come as close to the line as possible must be held strictly accountable when they overstep it.

The combination in this case has exhibited an extremely low and rapacious level of business behavior. These defendants are the largest motor carriers, which when combined, possess monopoly power. Protest and hearing mechanisms provided by the government were calculatingly employed by them to control the market by intimidation, terrorization and extortion. Fraud upon government and bribery of government officials for anticompetitive purposes are intolerable as well as a violation of the Sherman Act. Such weapons however need not be used by the sophisticated and powerful. Persons, with the same anticompetitive motivation as the perjurer and briber, are in a position to make a pretense of using government legitimately. Rather than induce a government official to act upon false premises or beyond his scope, such persons have the means to actuate and employ an indispensible, honored and historic mechanism of government, the legal process. This means is convenient because it can easily and automatically be actuated by the filing of sworn papers. This automatic feature exists because in our government it is presumed that these processes will only be used in good faith and for their intended purposes.

We cannot of course argue for a finding of Sherman Act violation by alleging the low moral caliber of the behavior here, nor by calling attention to the fact that in their deliberate plan to abuse lawful processes they are no more than hard core law violators. Plaintiffs need not make that argument because defendants' deadly—and new—form of business predation clearly violates the Sherman Act.

Should this Court condone defendants behavior there will be repercussions of great magnitude not only in the field of regulated industries where large companies wield great power but in any business where government approval is necessary for market entry or where government disapproval may terminate a going business. Harassment through litigation will be protected under the banner of protecting constitutional freedoms and, the *straw-man* in this particular case, "the chilling" effect.

Plaintiffs sincerely feel that they will be able to prove every allegation in their complaint and that they are not overstating the adverse effects a ruling in favor of defendants will have. Plaintiffs therefore respectfully ask for affirmance of the Ninth Circuit's decision.

Respectfully submitted,

MICHAEL N. KHOURIE,

Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,

MICHAEL N. KHOURIE,

Of Counsel for Respondents.

Dated, October 26, 1971.

(Appendix Follows)

Appendix

Relevant provisions from the Interstate Commerce Act. Urgent Deficiencies Act, Administrative Procedures Act, General Rules of Practice (I.C.C.), California Constitution, California Public Utilities Code, Rules of Practice and Procedure (California P.U.C.)

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49 USC § 17. Commission procedure; delegation of duties; rehearings

Conduct of proceedings; seal; oaths; quorum; rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpoenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the

Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

Findings, etc., of Commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as Commission's order

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefore, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Chapter 8 of this title, persons specified in section 305(e) of this title), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

Rehearing, reargument, or reconsideration of decisions, orders, and requirements

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter

assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

Reversal or modification after rehearing, etc.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order or requirement made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

Stay of decisions, etc., not effective at time of application for rehearing, etc.

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the

rules and regulations of the Commission, and the decision, order or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Reference of administrative matters to examiners

(10) Any matter arising in the administration of chapter 8 of this title as to which a hearing is to be held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work,

business or functions, as to which a hearing is to be held, to an individual Commissioner or board.

Intervention of representatives of employees

(11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

Admission to practice before Commission

(12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

49 USC § 305. Administration—Joint boards; composition; references of matters to boards

(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, permits or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the

approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; . . .

Oaths; attendance of witnesses and production of documents

(d) So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

Notice of proceedings and opportunity for hearing

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

Court review of Commission's orders; compelling Commission to take jurisdiction

(g) Any final order made under this chpater shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided*, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application of section 17 of this title

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Pecuniary interest in motor carrier under investigation forbidden

(i) No member or examiner of the Commission or member of a joint board shall hold any official relation to, or own any securities of, or be in any manner pecuniarily interested in, any motor carrier or in any carrier by raiload, water, or other form of transportation.

49 USC § 306. Certificate of convenience and necessity—Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possesions; "grandfather" provisions

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by

motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* . . .

Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(6) . . . In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding the authorization of operations in interstate or foreign commerce, may petition the Commission for reconsideration of the decision of the State commission authorizing operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect to the authorization of operations in interstate and foreign commerce.

(7) (A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was

also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. . . Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

Application for certificate; form and contents

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

49 USC § 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

49 USC § 309. Contract carriers by motor vehicle

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to

such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided, . . .*

Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the

nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

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2. URGENT DEFICIENCIES ACT

28 USC § 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 USC § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 USC § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 USC § 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 USC § 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor

is heard and determined by a district court of three judges under section 2284 of this title.

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3. ADMINISTRATIVE PROCEDURES ACT

5 USC § 551. Definitions

For the purpose of this subchapter—

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 USC § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before board or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully

prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 USC § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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4. INTERSTATE COMMERCE COMMISSIONS GENERAL RULES OF PRACTICE (49 CFR § 1100)

Rule 4. Communications and pleadings generally—

(e) Ex parte communications prohibited; penalties provided. Ex parte communications as defined in Appendix C to this part are prohibited and any person violating the prohibitions set out in such Appendix is subject to the penalties as therein provided.

Rule 19. Pleadings part of record. Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a

competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule.

Rule 38. Applications—(a) Forms and instructions. An application filed with the Commission shall be prepared in accord with and contain the information called for in the form of application, if any, described by the Commission, or any instructions which may have been issued by the Commission with respect to the filing of an application.

(b) Copies; service. Copies of an application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form or instruction.

Rule 55. Notice of hearing

(a) Assignment; service and posting of notice; electronically recorded transcript. In those proceedings in which a hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the Act.

Rule 56. Subpoenas—(a) Requests; particularity. Unless directed by the Commission upon its own motion, a subpena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby: *Provided, however,* That for good cause shown, in lieu of a petition, the request for such a subpena may be made orally upon the record to the officer presiding at the hearing. A request for issuance of a subpena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpena will be issued or denied accordingly.

(b) Issuance. A subpena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) Service. The original subpena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) Return. If service of subpena is made by a United States marshal or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating

the date, time, and manner of service; and return such affidavit on, or with, the original subpena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpena. The written acceptance of service of a subpena by the person named therein shall be sufficient without other evidence of return. The original subpena, bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or if so directed on the subpena, to the officer presiding at the hearing at which the person subpenaed is required to appear.

(e) Witness fees. A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

Rule 57. Depositions; preliminary—(a) When permissible. The Commission will either upon its own initiative, or for good cause shown by a party to a proceeding, issue an order to take a deposition.

(b) Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country a deposition may be taken before an officer or person

designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) When taken. Unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the assigned date of the hearing in such proceeding, and when the deposition is taken in a foreign country it shall not be taken within 30 days prior to such date of hearing.

(d) Fees. A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

Rule 58. Depositions; petitions. A petition requesting an order to take a deposition shall be filed with due regard to the time periods specified in rule 57(c) and shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken.

Rule 59. Depositions; order; interrogatories—(a) Order. If the petition requesting an order to take a deposition is granted which action may be taken without awaiting the possible filing of a reply, the Commission will serve upon the parties an order which will name the witness whose deposition is to be taken, and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place, and the officer before whom the deposition is to be taken, so

specified in the Commission's order, may or may not be the same as set out in the petition.

(b) Interrogatories. In lieu of participating in the oral examination, parties served with the order for the taking of a deposition may promptly transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim, but it is not necessary that such interrogatories be served upon the party at whose instance the deposition is taken.

Rule 60. Depositions; recordation of testimony. The officer before whom the deposition is to be taken shall observe the provisions respecting appearances (rule 71(a)), and typographical specifications (rule 15), put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise to record the evidence.

Rule 61. Depositions; objections. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

Rule 62. Depositions; deponent's signature. When the testimony is fully transcribed or otherwise recorded the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make

shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall state at the foot thereof the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress, the Commission finds that the reasons given for the refusal to sign are sufficient to require rejection of the deposition in whole or in part.

Rule 63. Depositions; officer's attestation. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not of counsel or attorney for any of the parties, and that he is not interested in the event of the proceedings.

Rule 64. Depositions; return to Commission. The officer shall securely seal the deposition in an envelope endorsed with the title of the proceeding, and shall promptly send the original and one copy thereof, together with the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. The deposition must reach the Commission not later than 5 days before the date of the hearing at which it is to be offered as evidence.

Rule 65. Depositions; notice of filing. The party taking the deposition shall give prompt notice of its filing to all other parties.

Rule 66. Depositions; copies. Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

Rule 67. Depositions; inclusion in record. At the oral hearing, if one is held, the deposition shall be offered in evidence by the party at whose instance it was taken. If not offered by such party, it may be offered in whole or in part by the adverse party. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it, which is relevant to the part introduced, and any party may introduce any other parts. Such deposition shall be admissible in evidence subject to such objections as to competency of the witness, or to the competency, relevancy, or materiality of the testimony as were noted at the time of taking of said deposition, or are made at the time it is offered in evidence.

HEARINGS

Rule 68. Prehearing conferences—(a) Purposes. Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

(b) Facts disclosed privileged. Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) Recordation and order. Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) Objection to the order; subsequent proceedings. If an order is entered a reasonable time shall be allowed to the parties to present objections on the ground that it

does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

Rule 69. Stipulations. Apart from the procedure contemplated by the prehearing provisions (rule 68), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

Rule 71. Appearances; standard of conduct; absence from hearing—(a) Who may appear. Any individual may appear for himself, and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) Appearances. An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of [illegible] part of the proceeding for

which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) Standard of conduct. Contemptuous conduct by any person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) Absence from hearing. If a party or his representative shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this rule, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

Rule 72. Intervention; petitions—(a) Content generally. A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and

interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) When filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown.

(c) Broadening issues; filing. If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) Copies; service; replies. When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commission. When a petition for leave to intervene is not tendered at the hearing, the original and two copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with Rule 22 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) Disposition. Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

Rule 73. Participation without intervention. In an investigation proceeding, in a proceeding under paragraphs (18) to (20) inclusive of section 1 [49 U.S.C.A. § 1(18)-(20)], or sections 5 and 13a of Part I [49 U.S.C.A. § 5, 13a], in application proceedings under Parts II, III, and IV [49 U.S.C.A. §§ 301 et seq., 901 et seq., and 1001 et seq.], and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Rule 75. Evidence; admissibility generally. Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of

evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

Rule 77. Evidence; prepared statements. With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

Rule 78. Evidence; official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the

dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry. This rule does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

Rule 79. Evidence; entries in regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

Rule 80. Evidence; documents containing matter not material. When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of such document if found to be material and relevant. The document itself will not be received.

Rule 82. Evidence; records in other Commission proceedings. If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this rule; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

Rule 83. Evidence; abstracts of documents. When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity to comply with rule 100. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

Rule 84. Evidence; exhibits—(a) Generally. Exhibits of a documentary character may have a maximum width of 22 inches by 12½ inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents

will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) Reference to tariff authority, routes, and distances. All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this rule.

(c) Copies. Unless the officer shall otherwise direct, the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless

the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the Uniform Bankruptcy Act [11 U.S.C.A. § 1 et seq.], the original and three copies of every exhibit of a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the officer.

(d) Interchange prior to hearing. Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Commission or presiding officer may so direct.

(e) When excluded how treated. In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

Rule 86. Evidence; filing of subsequent to hearing; copies. Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party

furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will not be assigned an exhibit number at the hearing, but the document will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

Rule 87. Evidence; objections to. Formal exception to a ruling of an officer at a hearing is unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection.

Rule 88. Oral argument before officer

If oral argument before the officer is desired, he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of times as he may determine, having regard to other assignments for hearing before him. Such argument will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission and request therefor may be made as provided in Rule 98.

Rule 89. Continuance for further hearing. A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable, the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

Rule 90. Transcript of record—(a) Filing. After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) Corrections. A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need be filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with 2 copies to the official reporter.

(c) No free copies. No free copies of transcript will be furnished to any party to any proceeding.

Rule 91. Briefs; content and arrangement—(a) Due date. The due date of each brief must appear on its front cover or title page.

(b) Table of contents; citations. A brief of more than 20 pages shall contain on its front flyleaves a table of contents and points made with page references, the table of contents to be supplemented by a list of citations, alphabetically arranged, with references to the pages where they appear.

(c) Sketch or chart. In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) Evidence abstract. A brief filed after a hearing should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. The abstract should follow the statement of the case and precede the argument. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in support of the respective statements of fact made throughout the brief.

(e) Requested findings. Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) Exhibit reproduction. Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain.

Rule 92. Briefs; when officer's report is served

In a proceeding which has been the subject of oral hearing, and in which an officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from

the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 93. Briefs; when officer's report is not served

In a proceeding which has been the subject of oral hearing, and in which no officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 94. Briefs of interveners

Briefs of interveners shall be filed and served within the time fixed for the brief or the party in whose behalf the intervention is made.

Rule 95. Officer's report; when and how served. After expiration of the time set for filing briefs, if the proceeding be one in which a hearing has been held, the officer's report will be prepared and served by mailing a copy to each party. An officer's report prepared in a proceeding in which a hearing has not been held will be served by mailing a copy to each party of record and to any other persons not parties to the proceeding who are believed to have an interest in the proceeding.

Rule 97. Effect of exceptions or absence thereof—(a) Upon report and recommended order. The filing of exceptions to a recommended order operates to stay the effectiveness of the order and thereafter decision by the Commission will be made in due course. If no exception

is filed to the recommended order and the Commission does not stay it, the recommended order becomes the order of the Commission upon expiration of the period for filing exceptions provided in rule 96(b), or of any postponement of such period, or postponement of the effective date of such order, and a notice stating that the recommended order has, giving the date, become the order of the Commission will be mailed to the parties by the Commission.

(b) Upon proposed report. A proposed report will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertained error the officer's statement of the issues and of the facts ordinarily will be taken by the Commission as the basis of its decision.

Rule 98. Oral argument before Commission—(a) Request; how made. If no officer's report is to be served, request for oral argument before the Commission must be made at hearing or by letter (original only need be filed with the Commission) within 10 days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

(b) Request for time allotment. If the petition is granted a notice will be served by the Commission upon the parties setting the date for the oral argument. At least 10 days before that date any party desiring to participate in the oral argument must make request by letter (original only need be filed with the Commission) for an allotment of time. Only those making request in this manner will be permitted to participate.

Rule 102. Petitions not otherwise covered

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rule 247. Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a) (6) relating to Certificates of Registration), 209, and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto.

(a) Scope and applicability of special rules—(1) Scope. These special rules govern the filing and handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 [49 U.S.C.A. § 306] (except section 206(a)(6) [49 U.S.C.A. § 306(a)(6)] relating to Certificates of Registration), 209, and 211 [49 U.S.C.A. §§ 309, and 311], (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309 [49 U.S.C.A. §§ 902(e), 903, and 909], and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410 [49 U.S.C.A. § 1010]. Except as otherwise herein provided, the general rules of practice shall apply.

(2) Applicability. These special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the FEDERAL REGISTER.

(b) Applications—(1) Form and content. An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application.

(2) Copies and service. Copies of an application filed under these special rules shall be furnished in such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) Requests for handling applications without oral hearing. An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) Notice to interested persons. (1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of

the authority sought in the FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations and Compliance as may be required by the prescribed form of the application.

(2) Amendments. Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the *Federal Register*. Restrictive amendments acceptable to the Commission may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant

without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and one copy) within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(c) Hearing or other procedures to be followed—(1) Determination. The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) Uncontested proceedings. Proceedings in which no protests are filed within 30 days after publication of notice in the FEDERAL REGISTER, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b) (3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) Contested proceedings. In those contested proceedings which the Commission determines that assign-

ment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with Rules 45(b), 46(b), and 47-54, inclusive, of the general rules of practice, except that only the original and one copy of any statement made pursuant to Rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) Withdrawal or dismissal of contested applications. If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission. Withdrawal of the application after the 30-day period or failure by applicant to appear at a hearing scheduled thereon will, except for good cause shown, subject applicant and its representative to censure.

(g) Notice of hearing, conference or other proceedings —(1) Initial assignment. Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) Assignment of an application for hearing concurrently with notice of its filing. For the convenience of the Commission in handling applications related to one or

more applications which already have been noticed in the FEDERAL REGISTER, when, in the Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the FEDERAL REGISTER can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) Requests for change. A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) Notice of changes. The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(h) Intervention. Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

(i) Drafting of recommended order and report by prevailing party. Applications in which oral hearings are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of a report and recommended order, prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

Appendix A—Code of Ethics for Practitioners Before the Interstate Commerce Commission

Preamble

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly

admitted to practice law, and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The word "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether members, examiners, or other employees connected with the matter in hand.

Canons of Ethics

1. *Standards of ethical conduct in courts of United States to be observed.* These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified in so far as the nature of the practice before the Commission requires.

2. *The duty of the practitioner to and his attitude towards the Commission.* It is the duty of the practitioner to maintain towards the Commission a respectful

attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. *In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity.* The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

7. The practitioner's duty in its last analysis. No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act [49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.] the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular liti-

gants before it. *To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them.* Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission.

9. *Adverse influences and conflicting interests.* It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethren, but, nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or im-

moral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivilous defenses, or if he deliberately disregards an agreement or obligations as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practi-

tioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. *Fixing the amount of the fee.* In fixing fees, practitioners should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. *Compensation, commission and rebates.* A practitioner should accept no compensation, commissions, rebates, or other advantages from parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. *Contingent fees.* Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. *Division of fees.* No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. *Suing clients for fees.* Controversies with clients covering compensation are to be avoided in so far as compatible with self-respect and with the right to receive reasonable recompense for services; and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable trans-

actions, that it is the duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should restrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. *Restraining clients from improprieties.* A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practitioners, witnesses and suitors. If a client persists in such wrongdoing the practitioner should terminate their relations.

25. *Ill-feeling and personalities between advocates.* Clients, not their representatives, are the litigants. Whatever may be the ill-feeling existing between clients, it

should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statement should be addressed to the Commission.

26. Treatment of witnesses and litigants. A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

27. (None.)

28. Discussion of pending litigation in public press. Attempts to influence the action and attitude of the members and examiners of the Commission through propaganda, or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and

unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The non-technical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just considerations for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the bystanders.

These and all kindred practices are unethical and unworthy of a practitioner.

30. *Right of practitioner to control the incidents of the trial.* As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. *Taking technical advantage of opposing practitioner; agreements with him.* A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. In so far as possible, important agreements affecting the rights of clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in Canon 32 may with propriety contain only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is

not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. *Justifiable and unjustifiable litigation.* The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. *Responsibility for litigation.* No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own re-

sponsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. *Discovery of imposition and deception.* When a practitioner discovers that some fraud or deception has been practiced, which has been unjustly imposed upon the Commission or a party, he should endeavor to rectify it: first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner), so that appropriate steps may be taken.

38. *Upholding the honor of the calling.* Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owes it to the Commission and to the public to bring the matter to the knowledge of the prosecuting authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sin-

cerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to their individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he

investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employment outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

Appendix C—Ex Parte Communications

1. Ex parte communications. (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceedings shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in appending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employer of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the

Commission together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

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5. CALIFORNIA CONSTITUTION

Art. XII § 22

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall

charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt *in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

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6. CALIFORNIA PUBLIC UTILITIES CODE

§ 312. Issuance and service of process: Fees

The commission and each commissioner may issue writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the commission or a commissioner. The person executing any such process shall receive such compensation as

is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

§ 1005:

Issuance of certificate; terms and conditions.

The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated street railroad line, plant, or system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon.

§ 1705. Who may appear at hearing: Witnesses: Making and filing of decision; Contents: Service of order: When order effective: Extension of time to comply with order

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all

necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

§ 1706. Record of proceedings

A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions

and the evidence therein specified shall constitute the record on review.

§ 1732. Specification of grounds

The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

§ 1733. Time for granting or denying application

Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

§ 1734. Hearing; time for determination

If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the matter within 20 days after final submission. If no determination is made within that time, it may be taken by any party to the rehearing that the order involved is affirmed.

§ 1735. Stay

An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof except in such cases and upon such terms as the commission by order directs."

§ 1736. Order of abrogation, change, or modification; effect

If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

7. CALIFORNIA PUBLIC UTILITIES COMMISSION'S RULES OF PRACTICE AND PROCEDURE

5. (Rule 5) *Verification.* Applications or amendments hereto shall be verified by each applicant. Complaints or amendments thereto shall be verified by at least one complainant. Answers shall be verified by at least one of the defendants filing the same. If the party filing the pleading is a corporation or association, the pleading may be verified by an officer thereof.

Verification may be made before a notary public or by certification or declaration under the penalty of perjury.

6. (Rule 6) *Signature and Verification by Attorney.* Except in transfer proceedings (see Rule 35), the attorney for a party may sign and verify a pleading if such party is absent from the county where the attorney has his office, or from some cause is unable to sign and verify such pleading. When a pleading is signed and verified by the attorney, he shall set forth in the affidavit the reasons why the verification is not made by such party.

7. (Rule 7) *Copies.* Unless otherwise required by the Commission, and except as to complaints (see Rule 11), there shall be filed with the Commission an original and twelve conformed copies of each pleading, or amendment thereof, and the original and twelve copies of each brief or petition for rehearing or petition for leave to intervene.

8. (Rule 8) *Amended Pleadings.* Amendments to pleadings, and amended pleadings, may be filed before hearing, provided they are served upon all known interested parties, filed at least five days before the hear-

ing, and contain a certification of service. Thereafter, pleadings may be amended as permitted, or directed, by the Commission or the presiding officer.

21. (Rule 21). *Common Carrier Certificates.*

Carrier by Vessel, P.U. Code, Secs. 1007-1009

Express Corporation, P.U. Code, Sec. 1010

Freight Forwarder, P.U. Code, Sec. 1010

Passenger Stage Corporation, P.U. Code, Secs. 1031-1036

Highway Common Carrier, P.U. Code, Secs. 1063-1064

Petroleum Irregular Route Carrier, P.U. Code, Secs. 1063-1064, 1067-1069

Cement Carrier, P.U. Code, Secs. 1063-1064, 1067

Passenger Air Carrier, P.U. Code, Secs. 2740-2765

In addition to being drafted to comply with Rules 2 through 8, 15 and 16, applications for certificates under any of the above sections of the Public Utilities Code shall contain the following data, either in the body of the application or in exhibits attached thereto:

(a) The type of service being performed by applicant, a general description thereof, and a reference to the authority under which existing service is performed.

(b) The specific authority requested and the particular statutory provision under which the certificate is requested.

(c) If a carrier of property, a description of specified commodities proposed to be transported, and, if general

commodities with exceptions are proposed to be transported, a statement specifying such exceptions.

(d) The geographical scope of the proposed operation, including the termini and other points proposed to be served, and a concise narrative description of the proposed route.

(e) A map or sketch of the route and points to be served, drawn to suitable indicated scale, and showing present and proposed operation by distinctive coloring or marking.

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(g) Applications to inaugurate new passenger stage service shall name any state or local authorities located in the area or areas to be served, upon whom service of said application is hereby required to be made, and shall name any other parties to whom copies of the application will be mailed. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(h) A statement of the rates or fares proposed to be charged and rules governing service. Applications for certificates need not contain tariffs, but shall indicate the

level and nature of proposed rates and rules and may refer to tariffs on file with or issued by the Commission.

(i) A statement indicating the frequency of the proposed service. If "on call" service is proposed, the application shall set forth conditions under which such service would be performed.

(j) The kind and approximate number of units of equipment to be employed in the proposed service.

(k) A statement of financial ability to render the proposed service.

(l) Fact showing that the proposed operation is required by public convenience and necessity.

49. (Rule 49) *Prehearing Conference.* A presiding officer may hold a prehearing conference for the purposes of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or prepared expert testimony, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding.

50. (Rule 50) *Facts Disclosed Privileged.* Facts disclosed in prehearing conferences are privileged. Except by agreement, they shall not be used against participating parties, before the Commission or elsewhere, unless proved by evidence other than that employed in disclosing such facts.

Article 14. Hearings.

51. (Rule 51) *Notice.* In complaint or investigation proceedings, the Commission will give notice of hearing at least ten days before such hearing, unless it be found that public necessity requires hearing at an earlier date.

Comparable notice ordinarily will be given when hearings are held in application proceedings.

52. (Rule 52) *Publication of Notice.* In rate increase applications filed by gas, electric, telephone and water utilities, unless specifically exempted or otherwise provided for by the Commission, the applicant, not less than five nor more than thirty days prior to the initial hearing, shall give notice of hearing to entities or persons who may be affected thereby, (1) by posting hearing notice in public places and (2) by publishing notice in a newspaper, or newspapers of general circulation in the area or areas concerned, of the time, date and place of such hearing. If ordered by the assigned Commissioner or Examiner, applicant shall give notice by bill inserts or by mail to the last known billing address of customers on applicant's records. Proof of such publication and sample copies of the other notices must be filed at or before the hearing.

In other types of applications applicant shall provide such notice to the public as the assigned Commissioner or Examiner may designate for such proceeding. Sample copies of forms of such notices shall be filed at or before the hearing.

53. (Rule 53) *Intervention.* In a complaint proceeding petitions to intervene and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. Such a petition shall be served and filed by petitioner at least five days before the proceeding is called for hearing, except

for good cause shown. If petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition shall be served and filed by petitioner at least ten days and the parties may serve and file replies at least five days, before the matter is called for hearing.

Leave will not be granted except on averments which are reasonably pertinent to the issues already presented, but do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention, or by the presiding officer at the hearing.

55. (Rule 55) *Consolidation.* Proceedings involving related questions of law or fact may be consolidated.

56. (Rule 56) *Motion to Dismiss.* A motion to dismiss (other than a motion based upon a lack of jurisdiction) and proceeding before this Commission, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made upon five days' written notice thereof duly filed and served upon all parties to the proceeding and all other parties upon whom service of copies of the pleadings are therein shown to have been made.

57. (Rule 57) *Order of Procedure.* In hearings on complaints, applications and petitions, the complainant, applicant, or petitioner shall open and close.

In hearings on investigation proceedings where filed rates or rules which do not result in an increase have been suspended, the respondent shall open and close. In

other investigation proceedings, the Commission's staff shall open and close. Interveners shall follow the parties in whose behalf the intervention is made. The presiding officer, where circumstances warrant, may vary the order of presentation.

Article 15. Subpoenas.

59. (Rule 59) *Requests for Subpoenas.* Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the Commission, shall be in writing and may be made by letter or wire.

60. (Rule 60) *Subpoenas Duces Tecum.* Requests for the issuance of subpoenas for the production of documents or records shall be in writing and shall be accompanied by an affidavit specifying the particular document or record, or part thereof, desired to be produced, stating the reasons why the production thereof is believed to be material and relevant to the issues involved.

61. (Rule 61) *Who May Issue.* Subpoenas may be issued by the Commission, a Commissioner, an Examiner, the Secretary, or an Assistant Secretary. No subpoenas shall issue unless applicant therefor establishes that he has a proper relation to the matter, and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued.

Article 16. Presiding Officers.

62. (Rule 62) *Designation.* When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners or an Examiner, may preside at the hearing.

Article 17. Evidence.

64. (Rule 64) *Form and Admissibility.* Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

65. (Rule 65) *Rulings.* The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the presiding officer may refer the matter to the Commission for determination.

66. (Rule 66) *Objections and Exceptions.* When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

67. (Rule 67) *Offer of Proof.* An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

68. (Rule 68) *Prepared Testimony.* With the approval of the presiding officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the pre-

siding officer, the witness shall deliver copies thereof to the presiding officer, the reporter, and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, and where the parties so agree, prepared testimony may be identified and accepted as an exhibit or copied into the record without reading, provided that copies thereof shall have been served upon all parties and the Commission ten days before the hearing or such prior service is waived.

69. (Rule 69) *Documentary Evidence.* If relevant and material matter offered in evidence is embraced in a document containing other matter, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded oportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

70. (Rule 70) *Exhibits.* Exhibits shall be legible and either prepared on paper not exceeding 8½ x 13 inches in size, or bound or folded to that approximate size. Wherever practicable, the sheets of each exhibit should be numbered, and rate comparisons and other figures shall be set forth in tabular form. Copies of exhibits must be clear and permanently legible.

71. (Rule 71) *Copies.* When exhibits are offered in evidence, the original shall be furnished to the presiding

officer and a copy to the reporter and to each party, unless the presiding officer directs otherwise.

72. (Rule 72) *Commission Records.* If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically indentified and are competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

73. (Rule 73) *Official Notice of Facts.* Official notice may be taken of such matters as may be judically noticed by the courts of the State of California.

74. (Rule 74) *Additional Evidence.* At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, he may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving exhibits numbers therefor.

Article 19. Decisions and Proposed Reports.

77. (Rule 77). *Issuance of Decisions.* A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

78. (Rule 78) *Petition for Proposed Report.* A party to a proceeding may file a petition requesting that

a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served and filed by other parties within five days after service of the petition.

79. (Rule 79) *Proposed Reports.* Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

80. (Rule 80) *Exceptions.* A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific, and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

81. (Rule 81) *Replies to Exceptions.* Replies may be served and filed within fifteen days after service of exceptions.

82. (Rule 82) *Service of Orders.* Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

83. (Rule 83) *Effective Date.* Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

Article 20. Reopening Proceedings.

84. (Rule 84) *Petition to Set Aside Submission.* After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

Article 21. Rehearings.

85. (Rule 85) *Petitions for Rehearing.* Petitions for rehearing of an order or a decision shall be served upon

all parties and should be filed before the effective date thereof, or, if the Commission has fixed a date earlier than the 10th day after issuance as the effective date of the order or decision, then before the 10th day after the date of issuance. (See P.U. Code, Sec. 1731.) Petitions shall set forth specifically the grounds on which petitioner considers the order to be unlawful or erroneous.

86. (Rule 86) *Effect of Filing.* Mere filing of a petition for rehearing shall not excuse compliance with a decision. A petition filed ten or more days before but not granted or denied before the effective date of an order suspends the order until the petition is granted or denied. (See P.U. Code, Sec. 1733.)